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ADMINISTRATIVE LAW SECTION

AMERICAN BAR ASSOCIATION

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CONTENTS

Chairman's Page 105

Compulsory and Voluntary Disclosure of Government Files. By Daniel J. McCauley, Jr. 108

Some Facts on Fact-Finding by An Investigatory Commission. By Frank C. Newman 120

"Independence" in the Independent Regulatory Agencies. By Robert W. Lishman 133

Ex Parte Communications: The Harris Bill, the CAB and the Dilemma of Where to Draw the Line. By Franklin M. Stone 141

Progress Report on the Code of Agency—Tribunal Standards of Conduct. By Cornelius J. Peck 151

Limitations on Agency Review: The Proposed NLRB Rules. By Victor G. Rosenblum and Ruth Smalley 154

Proposals for Changes in Appeals Procedures at the Department of Interior. By Robert L. McCarty 159

Observations on the Organization and Procedures Surveys of the ICC: A Subcommittee Report 183

Summary of the Third Annual Report of the Office of Administrative Procedure. By Webster P. Maxon. 199

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CHAIRMAN'S PAGE

Administrative Law and Procedure came in for extensive consideration at the recent meeting of the Inter-American Bar Association at Bogota, Colombia.

Several papers on Administrative Law were presented to the Conference through the Committee on Administrative Procedure, on which I served as Chairman. Sr. Manuel Maria Diez of Argentina delivered a paper on "Acts of Government," and Sr. Domingo M. Orlando Amoedo of Argentina delivered a paper on "Representation before Administrative Agencies."

The subjects covered by these papers gave rise to three resolutions which were adopted by the Conference. The first resolution called upon the constituent members of the Inter-American Bar Association to perfect the administration of democratic government in their countries to the end that the principles of democracy are furthered, individual property and liberties are protected, opportunity for economic and cultural development is afforded, and all forms of tyrannical rule are thwarted. The second resolution declared that the law should never prevent the judiciary from reviewing and declaring, by appropriate process, the unconstitutionality or illegality of any act of the various authorities of the State. The third resolution stated that the representation of persons in cases before administrative courts and agencies, which involve the application of the law, should be restricted to lawyers.

It was of interest to delegates from the United States that the administrative process occupies in Latin American countries an even greater role in the administration of government than in the United States, and that the problems with which we are constantly struggling in the effort to assure sound principles of administrative regulation likewise beset our neighbors to the South.

Lawyers participating in this meeting of the Administrative Law Committee of the Inter-American Bar Association at Bogota were united in the resolve to improve the administration of law and thereby to preserve and strengthen democratic government in the Western Hemisphere.

The full texts of the resolutions adopted at Bogota, in the form in which they were approved by the Council, are set out below:

Resolution on Democratic Government

Whereas, the Inter-American Bar Association stands firmly for the preservation and strengthening of democracy throughout the Western Hemisphere, and

Whereas, a democratic society is a law-ordered society, in which government rests upon the consent of the governed and where personal freedom is protected, private property is recognized, and opportunities are afforded for the fulfillment of human aspirations, and

Whereas, inadequacies in the administration of democratic government produce popular dissatisfaction, and contribute to political instability, giving tyrants the opportunity to seize power,

Now, Therefore, Be It Resolved:

One, that the Inter-American Bar Association calls upon its constituent members to do all they can to perfect the administration of democratic government in their countries to the end that the principles of democracy are furthered, individual property and liberties are protected, opportunity for economic and cultural development is afforded, and all forms of tyrannical rule are thwarted, and

Two, that the Inter-American Bar Association constitute a task force of experts in the administration of democratic government, the members and chairman of which shall be appointed by the President with the approval of the Council, to be known as THE INTER-AMERICAN BAR ASSOCIATION TASK FORCE ON DEMOCRATIC GOVERNMENT, the function of which shall be to obtain and furnish the constituent members of the Association with expert counsel and advice upon the administration of democratic governments of the Hemisphere.

Resolution on Judicial Review

Whereas, acts of the various authorities of the State are not universally subject to judicial review, and

Whereas, all such acts should be subject to such review for unconstitutionality and illegality,

Now, Therefore, Be It Resolved:

The law should never prevent the judiciary from reviewing and declaring, by appropriate process, the unconstitutionality or illegality of any act of the various authorities of the State.

RESOLUTION ON REPRESENTATION BEFORE AGENCIES

WHEREAS, cases before administrative courts and agencies affect important private rights, and

WHEREAS, in all such cases which involve the application of the law, persons should be represented by lawyers,

Now, Therefore, Be It Resolved:

Representation of persons in cases before administrative courts and agencies, which involve the application of the law, should be restricted to lawyers.

WHITNEY HARRIS, *Chairman*

NOTICE

The following have been named as members of the Section's Nominating Committee

RICHARD S. DOYLE, Chairman
Transportation Building
Washington 6, D.C.

MRS. FANNEY N. LITVIN
2800 Quebec Street N.W.
Washington 8, D.C.

WILLIAM I. DENNING
1518 K Street N.W.
Washington 5, D.C.

The By-laws provide that the Nominating Committee shall make and report one nomination for each position which is to be filled by election at the Annual Meeting. The Committee must submit its report to the Chairman of the Section in time to be published in the Administrative Law Review, or otherwise, prior to the Annual Meeting.

In order that the Nominating Committee may have the benefit of suggestions of the membership of the Section, it is urged that recommendations for nominees be forwarded promptly to the members of the Committee.

ELIZABETH C. SMITH, *Secretary*

COMPULSORY AND VOLUNTARY DISCLOSURE OF GOVERNMENT FILES

By Daniel J. McCauley, Jr.*

Blank, Rudenko, Klaus & Rome, Philadelphia, Pa.

I

A significant recent event in the area of law relating to the informational facilities of the Federal regulatory agencies was the indictment and conviction of Alexander L. Guterma and others for their failure to file necessary reports with the Securities and Exchange Commission with respect to (1) transactions in the securities of F. L. Jacobs Co., as well as (2) the financial condition of Jacobs, a company whose stock was listed on the New York Stock Exchange.[1] This case, for the first time, resulted in the imposition of a substantial criminal penalty for the failure to file a report with a regulatory agency, the principal purpose of which report was *to inform* members of the public. It is a necessary support to "the public's right to know" that the federal regulatory agencies seek prompt redress in the Courts, when, and if, recalcitrants omit to furnish necessary information for public scrutiny.

In the *Guterma* case the charges covered the failure by Guterma and an associate, as well as corporations which Guterma controlled, to file reports of "insider" stock transactions [2] and, also, reports showing the financial condition of the Jacobs Co.[3] In addition, Guterma and the other five defendants were charged with conspiring to violate the reporting sections of the law.[4]

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* Former member Securities and Exchange Commission and former General Counsel Federal Trade Commission.

1 United States v. Guterma, et al., 281 F.2d 742 (2 Cir. 1960) *cert. denied* 364 U.S. 871 (1960). The vital importance of the reporting requirements of the law was demonstrated by evidence at the trial which showed that the motive for defendants' failure to file stock ownership reports and annual reports was to conceal their manipulative and other transactions in the securities of the company and their simultaneous looting of the assets of the company for their own benefit. Guterma received a sentence of 4 years and 11 months and was fined $140,000. Other defendants received lesser, but substantial, punishment.

2 These are reports on S.E.C. Form 4 required under Section 16(a) of the Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. § 78p.

3 Section 13(a) of the Securities Exchange Act (15 U.S.C. § 78m) requires the filing of reports by corporations whose securities are listed on a national securities exchange.

4 The gist of the conspiracy was to "defraud the United States by impeding, im-

In the past the regulatory agencies usually limited their coercive persuasion either to mandatory orders, as in the S.E.C.'s now celebrated actions against Bernard Goldfine and the East Boston Company [5] or to suits to recover civil penalties for failure to file a report, such as the landmark case involving the Federal Trade Commission: *U.S.* v. *Morton Salt Co.*[6]

I would not urge that criminal sanction is better; the sanction sought should ultimately be directed towards obtaining the necessary information, for this is the mission of an agency in executing its statutory function. I would urge, however, that the regulatory agencies pay special attention to continuing aggressively to obtain prompt compliance with the reporting requirements of the statutes which they administer.

II

We can enumerate the basic functions of the regulatory agencies as: (1) Information Gathering; (2) Investigation and Enforcement; and (3) Quasi-Judicial (in which I would lump together "rule-making," "adjudication" and, in some circumstances, "licensing" as they are defined in Section 2 of the APA [7]).

The degree or amount of "information gathering" which the several regulatory agencies perform varies greatly among them. I suppose that the Securities and Exchange Commission engages in this activity to the greatest degree of all. During the proxy season—and at the period when most corporate annual reports are due—the S.E.C. literally is inundated with a tidal wave of "raw information," all of which the law, and, of course, the rules and regulations enacted pursuant thereto, require to be filed so that

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pairing, obstructing and attempting to defeat the lawful functions of . . . the Securities and Exchange Commission, in the protection of the investing public," by failing to file or obstructing and delaying the filing of the reports previously referred to and by filing reports of Jacobs "which were false and misleading with respect to material facts and which contained omissions of material facts."

[5] The case is unreported. It was brought in 1954 in the Federal District Court in Boston, Massachusetts, as Civil Action No. 54-348M. When East Boston persisted in its failure to file a report, as ordered by the Court, a fine of $3,000 was imposed.

[6] 338 U.S. 632 (1950). The District Court (ND Ill. 1951) imposed total penalties of $80,000, based upon a statute providing a penalty of $100 per day (15 USCA 50) against International Salt Co., and Morton Salt Co., for failure to file supplemental reports of compliance with a Federal Trade Commission order to cease and desist. Such reports are usually available for public inspection (16 CFR 1.132f).

[7] 60 Stat. 237, 5 U.S.C. 1001(c) (d) and (e).

it will be available for scrutiny by any interested member of the public. The Federal Trade Commission performs this function to a much lesser degree, and, then, in order among the other regulatory agencies, I would list Interstate Commerce Commission, Federal Communications Commission, Civil Aeronautics Board, and Federal Power Commission.[8]

It is impossible here to categorize the types of information which the regulatory agencies collect and have available for the public, whether in a raw or digested (or analyzed) state. The activities of the several agencies, as well as the nomenclature describing such activities, are so different that no good purpose would be served in enumerating them even in a footnote. Suffice it to say that all of the agencies have adopted and published rules which usually (1) describe the information available, (2) enumerate that which is not available, and (3) provide the procedure for applying to the agency concerned where disclosure of the information sought is discretionary with the agency.[9]

Doubtless attorneys who practice before a particular agency and who are knowledgeable with respect to the agency's procedures and nomenclature can find their way through the rules and evaluate their chances for obtaining the desired information. I must confess, however, that this Philadelphia lawyer has been unable to understand in depth some of the regulations of agencies with which he has had no previous experience. I am certain that all of us would be assisted if the various agencies published a document similar to the Securities and Exchange Commission's "Compilation of Documentary Materials Available in the S.E.C." [10] And, I do not think it unfair to say with respect to that publication that it could be considerably improved, from the point of view of the average general practitioner and the average member of the public, by a less technical description of the documents on file.

Two committees of the Congress have probed this field for the

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[8] Certainly the National Labor Relations Board qualifies as an independent regulatory agency. However, its recent disassociation from the others in the inquiries of the House Subcommittee on Legislative Oversight tends to submerge the fact.

[9] The pertinent rules of the several Agencies are as follows: Civil Aeronautics Board, 14 CFR 302.39, 302.314, 303.24; Federal Communications Commission, 47 CFR 0.322(a), 0.406; Federal Power Commission, 18 CFR 1.36 (1960 Supp.); Federal Trade Commission, 16 CFR 1.132-1.134; Interstate Commerce Commission, Vol. 25, No. 120 Federal Register p. 5602; National Labor Relations Board, 29 CFR 102.117 (1960 Supp.); Securities and Exchange Commission, Vol. 25, No. 137 Federal Register (July 15, 1960) 201.25.

[10] No. 570316, published February 26, 1957.

last several years—the Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary and the House Special Subcommittee on Government Information of the Committee on Government Operations.[11] As a result of the aggressive, continuing activities of these committees a vast store of raw information concerning policies and rules of the various agencies has been collected.[12]

Insofar as an agency's "Information Gathering" function is concerned every effort should be made:

(1) to get the information promptly,
(2) to have it readily accessible for public scrutiny, and
(3) to resolve doubts as to availability in favor of the public's right to know.

It is extremely difficult to justify suppression of some of the things which are listed in the Moss 1960 Report.[13] The regulatory agencies should do everything possible to eliminate all reasonable and proper objections to nondisclosure. Serious study might well be undertaken to coordinate among the regulatory agencies prompt efforts to correct improprieties—or at least to re-evaluate the present procedures in view of the numerous objections.

III

When we pass beyond the area of the collection of information for public use into either the enforcement (investigation) area or the quasi-judicial area problems immediately arise for the regulatory agency. Difficulty can arise from a congressional investigation or inquiry or from litigation, in which the agency may or may not be a party, or from the press or general public.

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[11] These subcommittees were headed respectively by the late Senator Thomas C. Hennings of Missouri and Congressman John E. Moss of California. Reference to each will be respectively as the "Hennings subcommittee" and as the "Moss subcommittee."

[12] The Hennings subcommittee has published a survey of Federal Departments and Agencies *"Withholding of Information from the Public and Press"* (Committee Print, 86th Congress, 1st Session, April 24, 1959), herein referred to as "Hennings 1959 Report." The Moss subcommittee's latest report is H.R. Report No. 2084—*Availability of Information from Federal Departments and Agencies—24th Report—July 2, 1960*, herein referred to as the "Moss 1960 Report." At pages 186 and 187 of this Report there is a list of all of the subcommittee reports in which the treasure of raw information is available to students of the field.

[13] See N. 12. The types of restrictions appear at pages 5 to 35 of the Moss 1960 Report. The great bulk of them involve Executive Departments, particularly the Defense Department, and this area is outside the scope of this paper.

It is, I think, beyond the real scope of this paper to discuss in any detail the question of what, if anything, a regulatory agency may properly withhold from a Congressional Committee. The controversy has raged since the first administration of George Washington and it shows no sign of abatement. Neither does it appear that there will be a clear test at an early date. Neither the Executive nor the Legislative branches seem anxious to precipitate a test. A challenge was made at one time by Congressman Hoffman to Congressman Moss but nothing resulted from it.[14]

Let us move on to the public—which includes litigants, the press and "General Public" itself.

For the purposes of analysis, one finds that the courts extend more favorable treatment to the government in the cases where it is not a party than in cases where it is a party to the litigation. At the same time, an analysis shows further that in criminal cases the courts have evidenced a more friendly attitude towards litigants seeking information.[15]

The leading case, involving a regulatory agency, in a situation

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[14] H.R. Report 1137—Availability of Information from Federal Departments and Agencies—12th Report—September 3, 1959. See Mr. Hoffman's minority report at page 456, 457, particularly N. 2 which quotes from testimony at hearings as follows and which is reproduced in full:

"MR. HOFFMAN. Mr. Chairman, it seems to me we have had this question up since the beginning of our Government. As I understand the issue here, GAO, which is the arm of the Congress and which we all support, wants certain information from the Air Force. Cannot counsel formulate the questions and, if the Air Force does not want to answer, get an issue of it and bring them in, cite them for contempt, and get a court decision; save a lot of time?

"MR. MOSS. The chairman is making no determination in advance as to the next step which will be taken.

"MR. HOFFMAN. I gather ultimately they will sit back and say, 'No, you cannot have it.' If that is it, why not get to the courts as soon as we can?

"MR. MOSS. There are probably other means as well as the courts which might be open to the Congress to compel production of information of this type. Thank God, the framers of the Constitution gave us control over the purse strings and that is a very persuasive control on occasion.

"MR. HOFFMAN. We are not going to vote against Defense too much.

"MR. MOSS. We sometimes have a device called a rider that is very effective, which might be considered as a means of dealing with some of these problems. There are many ways to skin a cat." Hearings of Moss subcommittee, Nov. 12 and 13, 1958, 85th Cong., 2d Sess.: Pt. 16, Department of Defense, Seventh Section (Air Force-GAO), p. 3615.

[15] For anyone researching this general problem an article which is "must" reading is Timbers and Cohen, *Demands of Litigants for Government Information*, 18 U.Pitt.L.Rev. 687 (1957). Also recommended is: Carrow, *Government Nondisclosure in Judicial Proceedings*, 107 U.Pa.L.Rev. 166 (1958). The author has also been over this field: 19 Fed.B.J. 13 (1959).

where private persons sought information from agency files where the agency was not a party to the case is *Appeal of the Securities and Exchange Commission and William H. Timbers.*[16] This case, which has come to be known as the Timbers case, arose out of litigation between contending factions seeking control of Monroe Paper Products Company. The situation did not come to the attention of the S.E.C. until after the private suit had been instituted in the District Court in Detroit, Michigan. Thereafter, the S.E.C. conducted an investigation to determine whether there had been violations of the Securities laws. When the case came on for trial, the plaintiffs served a subpoena duces tecum on a S.E.C. employee in its Detroit branch office demanding that the Commission produce certain reports and other information in its files. In an endeavor to cooperate, the Commission sent two of its staff employees from Washington to Detroit with instructions with respect to the information they could disclose in response to questions. Obviously, in the opinion of counsel for the plaintiff and, incidentally, of the trial judge, the information proffered was not sufficient.

In the course of the trial, Judge Arthur Lederle made many statements consistent with those of theoreticians who urged the right of the public to know. At one point Judge Lederle said "It is my view that the business of all agencies of government is public business." (Tr. 4418; Rec. 103a.) At another point he said "Frankly, I see no reason why all of the files of the Securities and Exchange Commission relating to this case shouldn't be open to the attorneys on either side, I can't conceive of anything that is secret about it." (Tr. 4512; Rec. 121a.) With these statements as a springboard, it was not long before the trial judge was in complete disagreement with the position which the S.E.C. had taken. When it became apparent that it was likely that the two Commission employees might be held in contempt, the S.E.C. General Counsel, William H. Timbers, went to Detroit to represent them. By this time the questions being directed to the witnesses had progressed far beyond the scope thereof originally indicated by counsel for the plaintiffs. Also, by this time all of the Commission's files in the investigation were physically in the courtroom. The Commission had filed a formal claim of privilege with respect to its files, particularly excluding from disclosure

[16] 226 F.2d 501 (6th Cir., 1955).

internal memoranda, staff recommendations to the Commission, and Commission minutes.

Several times during the testimony, the S.E.C. General Counsel offered the documents in question to the court upon the basis of a qualified tender. The theory was that the trial judge should examine the documents *in camera* to determine the legal question of privilege. The qualified tender also carried with it the understanding that, were the Judge to decide the documents were not privileged, they should be sealed pending a decision of the Court of Appeals. Presumably, on the theory announced in the quotations which I have mentioned, the trial judge declined to accept the documents on the basis of this qualified tender. He finally directed that the S.E.C. General Counsel himself be sworn as a witness and, in the course of the examination, Mr. Timbers refused to deliver to the plaintiff's attorney a document which he was ordered by the trial judge to give to him in the courtroom.

Under the Securities Exchange Act of 1934 it is a criminal offense for an employee of the Commission to disclose information in a Commission file unless authorized to do so by the Commission and, pursuant to its rule-making power, the S.E.C. has adopted regulations which preclude Commission employees, even its General Counsel, from disclosing information which the Commission has determined should not be published. All this had been stated and restated in the courtroom *ad nauseum*.

Upon Timbers' refusal to deliver the paper, he was ordered held in contempt by the trial judge *instanter*. A marshal was called in and Timbers was delivered into his custody. Timbers was denied the right to counsel in the courtroom. When he asked for a stay of execution of the order so that he might file an appeal, this was likewise denied.

I should also point out that the S.E.C. offered counsel for the plaintiffs an opportunity to test the validity of the regulations directly. Mr. Timbers suggested that counsel serve a subpoena on a member of the Commission in Washington, D.C., which would permit counsel then to raise, not the right of an employee on instruction to withhold information, but the right of the Commission itself to withhold information and refuse to honor the subpoena by assertion of a privilege. Of course, this would have put the case in another forum and it is speculative whether or not this was the reason counsel for plaintiffs abandoned the idea of serving a subpoena on a member of the Commission after he had previously indicated that he would pursue this course.

The Court of Appeals for the Sixth Circuit reversed the trial judge, stating, among other things, that he overstepped appropriate judicial bounds when he took the view that it was part of his function to conduct a searching inquisition into what he considered to be neglectful inaction on the part of the S.E.C.

This case does not stand alone in this area of the law but it is the most dramatic factual presentation of the problem.

In the criminal field the leading recent case is the *Jencks* case [17] in which the Supreme Court held that, where crucial testimony was given against the defendants by paid undercover agents for the FBI, the reports of such undercover agents should be made available to the defendants for the purpose of cross-examination. One of the witnesses who had given such testimony in this case was a gentleman whose integrity had been challenged in other matters prior to the Jencks trial. The Jencks case was one of the most widely misinterpreted decisions of the Supreme Court in the short time that it was allowed to stand on the books without corrective legislation. There followed numerous district court decisions which were themselves in conflict. In many instances, the Department of Justice, rather than disclose information, withdrew prosecutions and permitted what they obviously thought were guilty parties to go free in order to safeguard the integrity of government files.

Criminal lawyers, taking advantage of this opening wedge, proceeded to make demands for information in government files and took the position that the Jencks case was an "open sesame." The case created so much of a stir that in a very short time the Congress passed a statute to correct the flood of misinterpretations by district court judges of the impact of the Jencks case.[18]

The principal effect of the statute is to buttress the privilege against disclosure of government enforcement files. The statute provides that (1) the production of statements and reports shall be limited to situations where a government witness has testified; (2) on request the court may examine such statements *in camera* and excise irrelevant portions thereof, with the proviso that if a defendant objects then the statement will be preserved for con-

[17] U.S. v. Jencks, 353 U.S. 657 (1957).

[18] The statute is popularly referred to as the Jencks statute: 71 Stat. 595 (1957), 18 U.S.C. § 3500 (Supp. V. 1957). For Supreme Court interpretations of its provisions see Pittsburgh Plate Glass Co. v. U.S., 360 U.S. 395 (1959); Rosenberg v. U.S., 360 U.S. 367 (1959); Palermo v. U.S., 360 U.S. 343 (1959); Clancy v. U.S., 29 L. Week 4241 (1961).

sideration on appeal and the trial will continue; (3) upon an election by the Government not to make a statement available the court may either (a) strike the testimony of the witness, or (b) declare a mistrial; and (4) the term "statement" of a witness is limited to either (a) a written statement made and signed by the witness or otherwise adopted or approved by him, or (b) a substantially verbatim recital of an oral statement to a government agent which has been recorded contemporaneously (stenographically, mechanically or electrically) with the making of the oral statement.

IV

The following is an attempt to summarize guide lines relating to disclosure or—perhaps I should say—nondisclosure by regulatory agencies.

1. I suppose that everyone concedes that information which affects the national security should not be disclosed,[19] and this type of information can be in the possession of a regulatory agency and its nondisclosure safeguarded.[20] To this can probably be added safely matters relating to the conduct of our foreign affairs.

2. Before going any further I should throw up the caution light. There are many who would stop at this point, particularly insofar as Congress' right to know is concerned. However, be that as it may, I am certain that with regard to the public the perimeter of nondisclosure extends beyond that stated above.

The second guide line is that it appears clear that employees of regulatory agencies cannot be required to disclose information if they have been instructed by the agency not to do so.[21]

3. In litigation care must be taken properly to claim privilege;

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[19] United States v. Reynolds, 345 U.S. 1 (1953).

[20] Bendix Aviation Corp., Bendix Radio Div. v. F.C.C., 272 F.2d 533, 544 (D.C. Cir., 1959), cert. denied 361 U.S. 965, wherein the Director of the Office of Civil and Defense Mobilization successfully claimed privilege with respect to information he had furnished the F.C.C. relating to ". . . plans for the assignment of frequencies . . . essential to the maximum security of the United States in time of national emergency . . ." (at page 544).

[21] The Timbers case is the leading case to support this point as related to a regulatory agency. See N. 15. A recent case, involving a Regional Director of the Railroad Retirement Board, is: Hubbard v. Southern Railway Company, 179 F.Supp. 244 (D.C. M.D. Georgia, Macon Div., 1959). The important cases generally are: Boske v. Comingore, 177 U.S. 459 (1900); Touhy v. Ragan, 340 U.S. 462 (1951); *Ex parte Sackett,* 74 F.2d 922 (9th Cir., 1935); Jackson v. Allen Industries, Inc., 250 F.2d 629 (6th Cir., 1958), *certiorari denied,* 356 U.S. 972 (1958).

a claim of confidentiality is meaningless. It must be demonstrated that that which is being withheld is protected by some privilege.[22] In analysis, before treating at all of privilege, advantage should be taken of questions of relevance [23] and consideration should be given to the problem of necessity.[24]

4. We come next to privilege itself. Loosely it is referred to as "Executive Privilege," but, depending upon one's view of the status of the regulatory agencies, the nomenclature may not fit so well. Perhaps it depends upon the context in which the issue arises. Query whether any Congressional Committee would unqualifiedly concede that there is such a thing as an agency privilege against disclosure to Congress. Some agency members I know would not claim it; others would and at least one has. I believe there is agency privilege to a degree even against Congressional demand. The view which persuades me is the functional approach to the question of disclosure which was extremely well stated by Attorney General William P. Rogers in an appearance before the Hennings subcommittee on March 6, 1958.[25] He would, for example, urge the existence of an unquali-

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[22] Communist Party of the United States of America v. Subversive Activities Control Board, 254 F.2d 314 (D.C. Cir., 1958), wherein the Court stated at 321: "The first point here concerns the status of the documents involved; they are official possessions of the FBI. The Government repeatedly urges that they are confidential. Only in its brief here, and only in one sentence, does it claim they are privileged. *There is a vast difference between confidential and privileged.* Almost any communication, even an ordinary letter, may be confidential. Such a document may not relate to any matter of high public concern. But *privileged means that the contents are of such character that the law as a matter of public policy protects them against disclosure.* A communication from a person to his banker may be confidential, but it is not privileged; certain of his communications to his doctor or his lawyer are not only confidential but also privileged; the law does not permit their disclosure even under subpoena by a court. So, too, with Government documents. . . .

"The Government did not claim before the Board in the present proceeding that the documents here involved are privileged. No factual allegations as to privilege have been made. We cannot consider an unsupported claim made only in the brief here that the doctrines of privilege apply. That the documents are merely confidential does not protect them against compulsory disclosure. Of course this does not mean such documents must be produced upon every demand; good cause for intrusion into confidential files and materiality and relevancy must be shown. The law in that area is well settled." (Emphasis supplied.)

[23] The most lucid decision dealing with relevance is Judge Rives' in Overby v. United States Fidelity and Guaranty Co., 224 F.2d 158 (5th Cir., 1955).

[24] A civil case dealing with the problem of necessity is: Mitchell v. Roma, 265 F.2d 633 (3rd Cir., 1959).

[25] See Hennings 1959 Report, supra N. 12, p. 682 and particularly pp. 694-5.

fied privilege when a regulatory agency is performing a judicial function.

In litigated matters, and necessarily, then, in public inquiries, the Courts have recognized some privileges which I would classify as unqualified. The strongest of these has been the right of an agency to resist direction from an outside source as to its control of the conduct of its business.[26]

Next I would list the agency's freedom from invasion of its "thought process" and "decision-making," whether the latter relates to policy or adjudicative matters.[27]

What privileges safeguard the integrity of investigative files? I think we must consider this problem from the point of view of the contents of the file. For example, there should be a clear distinction between raw evidentiary material and matters of opinion by staff personnel such as an evaluation of a prospective witness. Of course, extreme care should be exercised to keep the two separate. Staff recommendations, it would seem, should be within the previously mentioned protections, but it is less clear with respect to raw evidentiary material. While witness statements, for example, might be ultimately reachable, agencies have

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[26] Timbers case, supra, N. 15. See also: Adams v. Nagle, 303 U.S. 532 (1938); Wilbur v. U.S., 281 U.S. 206 (1930); Leighton v. S.E.C., 221 F.2d 91 (D.C. Cir. 1955); Crooker v. S.E.C., 161 F.2d 944 (2d Cir. 1947); General Drivers, etc. v. N.L.R.B., 179 F.2d 492 (10th Cir. 1950); Berlinsky v. Woods, 178 F.2d 265 (4th Cir. 1949).

[27] United Air Lines v. C.A.B., 281 F.2d 53, (D.C. Cir., 1960): "There was no claim before the examiner that this study would reveal any data pertinent to the issues involved at the hearing stage. Cf. Deep South Broadcasting Co. v. F.C.C., 278 F.2d 264 (CA D.C., 1960). And cf. North American Airlines v. C.A.B., 240 F.2d 867, 874 (1956). The motion for production in the instant case was obviously intended to 'probe the mental processes' of the Board (see United States v. Morgan, 313 U.S. 409, 422) and, under the circumstances of this case as in *North American*, 'denial of access to such material reflects no error.'

See also Boeing Airplane Co. v. Coggeshall, 280 F.2d 654 (CA D.C., 1960), wherein the court said: "But a claim of privilege is asserted, particularly with regard to recommendations to the Board by those in concert with it. To the extent that the documents deal with recommendations as to policies which should be pursued by the Board, or recommendations as to decisions which should be reached by it, the claim of privilege is well founded. In fact, the Tax Court itself has disavowed any interest in the Board's deliberations. Thus, the showing of necessity is not one which impinges on the integrity of the Board's decision-making process, and that process should be protected." See also Kaiser v. U.S., 157 F.Supp. 939, 946 (Ct. Cl. 1958) where the General Services Administrator was not compelled to produce an advisory opinion on intra-office policy in relation to sales of factories by the government. The opinion by Justice Reed (Retired) suggested a distinction between requests for disclosure of "primary facts" contained in such opinions and other "written statements and mental impressions."

been reasonably successful in protecting the identity of informers [28] and the same rule, it seems, would apply to complainants.

There has been no clear test of the "work product" doctrine of *Hickman* v. *Taylor* [29] which was raised but not reached in the *Timbers* case.[30] The only case involving witnesses' statements where it recently has been indirectly adverted to is found in the District Court's order in *Mitchell* v. *Roma* [31] wherein the court ordered that plaintiff should indicate which of the above-mentioned *written* statements were taken by persons other than attorneys of record in the proceedings, since it had been intimated at the hearing that some of the statements might have been taken by attorneys of record.

5. There are many things not protected, in addition to those already mentioned, and care should be taken to be very selective in claiming privilege. I have urged that agency deliberations are protected, but this would not, I believe, protect from disclosure every and all agency minutes of deliberations. We cannot apply the ideas of nominalism to this area of the law. The nature of the matter deliberated—not the deliberation itself—is more properly the subject of privilege. Not all minutes of meetings would be privileged.

6. Now consider that, whereas the decisional process is protected, that process is usually applied to facts developed in a public record. Everyone concedes that the record in quasi-judicial cases should be open. This leads, however, to a new set of problems relating to *ex parte* communications,[32] and even the handling of inquiries from Congress or the White House, all of which were the subject of considerable Congressional study and review during the 86th Congress.[33] Currently, most such communications are non-public.

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[28] Mitchell v. Roma, supra, N. 23. Cf: Rovario v. United States, 353 U.S. 53, 59-61 (1957); but cf then: Amaya v. United States, 247 F.2d 947 (4th Cir., 1957), *certiorari denied,* 355 U.S. 916 (1958); United States v. Colletti, 245 F.2d 781 (2d Cir. 1957); United States v. Walker, 246 F.2d 519 (7th Cir. 1957); United States v. Gernie, 252 F.2d 664 (2d Cir. 1957), *certiorari denied* 78 S.Ct. 1006.

[29] 329 U.S. 495 (1947).

[30] Supra N. 15.

[31] 22 F.R.D. 217.

[32] Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959); United Air Lines, Inc. v. C.A.B., supra, N. 26.

[33] See H.R. 4800 and like proposals. Also see: Mollenhoff, *Executive Privilege—A Problem for Press and Bar: A Journalist's View,* 19 Fed.B.J. 30, 36 (1959) wherein this distinguished writer unequivocally urges publication of all such communications.

SOME FACTS ON FACT-FINDING BY AN INVESTIGATORY COMMISSION

By Frank C. Newman *

During the 1950's there was no dearth of discussion as to what should be done about Congressional investigations. Abuses were criticized, procedures proposed, and constitutionalities examined. Some of that discussion continues, but the writers now focus not so much on what Congress has done as what courts do when "victims" of Congress litigate their complaints (as in *Watkins* v. *U.S.* and *Barenblatt* v. *U.S.* for example).[1]

With such a rich literature on the alleged sins of our Senators and Representatives, it is unfortunate that so little attention is now given to reforms and related developments that Congress itself has sponsored (unaided by court decisions). The censure of Senator McCarthy was by no means the only or the most important response by legislators to criticism of their investigatory process. New procedures have been promulgated and new techniques tried in efforts to assure to Congress the benefits without the evils of investigatory fact-finding.[2]

This article examines one set of those new procedures and a commendably experimental delegation of investigatory authority. The subject is the United States Commission on Civil Rights, created by the Civil Rights Act of 1957. For lawyers and others concerned with reforms of Congressional investigations the Commission is of special interest for these reasons: (1) it is governed by rules of procedure almost identical to the "Fair Play Rules" that since 1955 have governed committees of the House of Representatives; and (2) it exemplifies the assignment to a non-legislative body of tasks almost identical to the tasks that investigating committees perform. Prior to the House action in 1955 many critics argued that decency in investigation could be achieved only if rules of fair play were enacted, and some critics have urged too

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1 *E.g.*, see Nutting, *Congressional Investigating Committees—The Coming Dawn?*, 46 A.B.A.J. 1353 (1960); Slotnick, *The Congressional Investigating Power: Ramifications of the Watkins-Barenblatt Enigma*, 14 MIAMI L. REV. 381 (1960).

2 See Note, 45 CALIF. L. REV. 347 (1957); *cf.* Heubel, *Congressional Resistance to Reform: The House Adopts a Code for Investigating Committees*, 1 MIDWEST J. POL. SCI. 313 (1957).

that Congress consider the British experience with commissions of inquiry and adapt that experience to our needs in America.[3]

Duties and Organization of the Civil Rights Commission

Like most Congressional committees, the Commission is instructed to "appraise the laws and policies of the Federal Government." Its subject matter is "equal protection of the laws." It must "study and collect information concerning legal developments constituting a denial" of equal protection, and also "investigate [sworn] allegations . . . that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their race, religion, or national origin."

Again like most committees the Commission, after it has investigated allegations, collected information, and made its appraisal of laws and policies, is directed to submit "reports of its activities, findings, and recommendations." Its life-span of two years was in 1959 extended to four years, and in January this year President Eisenhower requested that the term further be extended to September 1963.[4]

The typical committee, of course, reports to the House or Senate. The Commission's reports are submitted "to the President and to the Congress"; and the Commission is "in the executive branch of the Government." Its six members (of whom "[n]ot more than three . . . shall at any one time be of the same political party") are appointed by the President with the Senate's advice and consent. A staff director whose salary may total $22,500 is similarly appointed, and "the Commission may appoint such other personnel as it deems advisable."

This article will not review all the Commission's activities during 1957-61. Members of the American Bar Association were favored with an impressive summary of the first formal report; [5]

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[3] The outstanding study is the 1954 Report on Congressional Investigations of the ABA Special Committee on Individual Rights as Affected by National Security (Whitney North Seymour, *Chairman*). The recommendations in that report, calling for a Code of Investigative Procedure, were approved by the House of Delegates on August 17, 1954. For discussion of British models see Taylor, Grand Inquest (1955) 285; Warren, *The Royal Commission: An Example To Be Followed,* 5 COL. L. ALUMNI BULL. 15 (Sept. 1960); Finer, *Congressional Investigations: The British System,* 18 U. CHI. L. REV. 521 (1951).

[4] See N.Y. Times, Jan. 17, 1961.

[5] Storey, *The Report of the Commission on Civil Rights,* 46 A.B.A.J. 39 (1960); *cf.* Heyman, *Federal Remedies for Voteless Negroes,* 48 CALIF L. REV. 190 (1960).

and we can fairly observe that the agency so far has discharged its duties with distinction and, aided by an able and dedicated staff, made a notable contribution to the betterment of "the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution."

The Power of Subpena

The Civil Rights Act states, "Subpenas for the attendance and testimony of witnesses or the production of written or other matter may be issued . . . over the signature of the Chairman. . . ." The power can be used to promote any of the Commission's aims. The only significant restriction, § 102(k), reads "The Commission shall not issue any subpena for the attendance and testimony of witnesses or for the production of written or other matter which would require the presence of the party subpenaed at a hearing to be held outside of the State, wherein the witness is found or resides or transacts business."

If a man disobeys a subpena the sanctions a Congressional committee may use are not available. Instead the Commission asks the Attorney General to apply to a federal court for an order of enforcement; and only if that order is disobeyed may the man be punished, after contempt proceedings.

The Power to Publicize

Observers seem to agree that the most troubling activities of investigating committees are those which harm reputational and emotional interests. The weapon used is publicity; and names of men and women who have been maimed by that weapon, though they will not be listed here, are easily recalled.

There is nothing in the Civil Rights Act that tells the Commission not to injure people by publicity, and the power to publicize is clearly implicit. Section 102(e), an important clause adapted from the House Fair Play Rules, requires that evidence or testimony be received in executive session if the Commission determines that it may tend to defame, degrade, or incriminate any person; but subsequently, with the Commission's consent, that evidence or testimony may under § 102(g) be "released or used in public sessions" regardless of its defamatory, degrading, or incriminating effect.

Rules of Procedure

The main aim of this article is to identify some deficiencies in the procedure rules that now govern the Commission's power of subpena and power to publicize. As noted above, the draftsmen of the Civil Rights Act took as their model the Fair Play Rules that in 1955 the House of Representatives declared should govern all House committees. Those rules have not attracted much attention,[6] and our discussion here may be useful for its pertinence to investigatory committees as well as investigatory commissions.

The rules effect several reforms regarding many procedures that critics of Congressional committees found objectionable. For example, hearings are to be before the Commission itself or a subcommittee of not less than two members; subpenas must be signed by the chairman of the Commission or subcommittee; copies of the rules must be made available to witnesses; and on payment of the cost a witness may obtain a copy of his testimony at a public session.

Derogatory Information

The boldest reform appears in the provision mentioned above that requires an executive session whenever defamatory, degrading, or incriminating data are to be heard. It reads:

> If the Commission determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall (1) receive such evidence or testimony in executive session; (2) afford such person an opportunity voluntarily to appear as a witness; (3) receive and dispose of requests from such person to subpena additional witnesses.

Note that the restriction is aimed at the power to publicize as well as the power of subpena. In other words, evidence or testimony that may tend to defame, degrade, or incriminate must be received in executive session whether or not it affects a subpenaed witness or is submitted by a subpenaed witness. All defamatory, degrading, and incriminating information used at hearings is controlled—from files, staff members, friendly witnesses, unfriendly witnesses.

An executive session is necessary "[i]f the Commission determines that evidence or testimony may tend to defame, degrade, or incriminate." There is no suggestion, however, that the determina-

[6] *Cf.* note 2 *supra;* and see 101 Cong. Rec. 5821 (1955).

tion may be arbitrary.[6a] Nor may we infer that the Commission may by rule or practice avoid its task of determining. The words rather imply a Congressional concern wtih *all* evidence or testimony that may tend to defame, degrade, or incriminate. The Commission is directed to consider whether *any* evidence or testimony it is about to hear will have that effect.

The section does not read, "Upon request, the Commission shall determine. . . ." Thus the procedure need not be requested; and the right to an executive session, for example, cannot be waived by failure to request. The reason is that derogatory information will often—most often, perhaps—affect people whose presence to hear it cannot be assumed. Congress did not say, "Anyone who happens to be present or knows about the hearing may ask for a determination as to whether the information tendered may defame, degrade, or incriminate him." On the contrary, Congress said this to the Commission (as the House earlier said to its committees): "There has been criticism about the unfairness of publicizing derogatory information. In the future, therefore, we direct you to determine whether information to be received may tend to defame, degrade, or incriminate. If it may, certain procedures are hereby prescribed. After those procedures have been observed you may use the information in public session or otherwise release it, not before."

How the Commission Has Handled Derogatory Information

Unhappily, the Commission has not contributed much to our understanding of the Congressional directive. It has proceeded under § 102(e) only once, and the Chairman's announcement at that hearing is not illuminating: "[T]his morning will be an executive session since we are going to receive from our own people the information that they have gained as a result of their examination of the records in Macon County." The staff's testimony was made public six months later, and the accompanying release (CCR #73, July 30, 1959) reads:

> Gordon M. Tiffany, staff director of the Commission, stated that the testimony shows "a consistent pattern of denial of equal protection of the laws as regards voting in six Alabama counties." The counties to which he referred were Macon, Barbour, Bullock, Dallas, Lowndes and Wilcox.

[6a] See American Sumatra T. Corp. v. SEC, 93 F.2d 236, 239 (D.C. Cir. 1937).

> In the executive session, held on January 9, 1959, the Commission heard testimony from four members of its staff who had examined voting records in the counties involved. The staff members testified that a double standard was used by some Alabama registrars when considering white and Negro applicants for voter registration.
>
> They testified that Negroes were required to copy lengthy articles of the United States Constitution and were often disqualified for minor mistakes that did not generally disqualify white applicants. They also testified that there was little uniformity in application of the registration laws and that some registrars were not familiar with the laws they were responsible for administering.

Thus, identifiable registrars were defamed, degraded, or incriminated.[7] What is puzzling is that before the Commission held its executive session it had already held three public sessions where similar testimony seems to have been at least as defamatory, degrading, and incriminating as were the secret staff reports. At the second hearing, for instance, one subpenaed witness felt obliged to claim his privilege against self-incrimination; and at the first the presiding officer summarized as follows: "Let me conclude by restating the issue before us: Are certain citizens of the United States being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin?" With that as the issue could the Commission conceivably have determined that none of the evidence or testimony to be received would tend to defame, degrade, or incriminate any person? It must be added too that the Commission, pursuant to a schedule arranged by its staff, then proceeded to hear 33 complainants, each of whom had already alleged in writing, under oath or affirmation, that he was a citizen who improperly had been deprived of voting rights.

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[7] In the Commission's 1959 Report there are many statements that derogate identifiable Southerners, including the Alabama registrars. *E.g.*, see p. 95 (Messrs. Grady Rogers and E. P. Livingstone; and *cf.* pp. 76, 90, 640, 655); p. 63 (county clerk and chairman of the Election Commission of Haywood County, Tenn.); p. 64 (sheriff of Fayette County, Tenn.); p. 59 (registrar and deputy sheriff of Bolivar County, Miss.); p. 70 (white notaries of Bullock County, Ga.); p. 101 (registrars of parishes surrounding and including Shreveport, Ala.); pp. 62, 67, and 92 (registrars of Clarke County, Miss., Terrell County, Ga., Barbour and Dallas Counties, Ala.); p. 61 (registrar of Forrest County, Miss.—posthumous). *Cf.* Application of United Electrical, Radio, and M. Workers, 115 F. Supp. 858 (S.D. N.Y. 1953). In my opinion the Government's discussion of the Report in oral argument before the Supreme Court was highly misleading. (Transcript, pp. 59-60.)

It appears, therefore, that the Commission has misunderstood the procedure Congress prescribed for hearings where evidence and testimony may tend to defame, degrade, or incriminate. And in the recent case of *Hannah* v. *Larche,* involving the legality of a hearing in Louisiana that was to be similar to the Alabama hearing, the Solicitor General's brief, briefs for respondents, and all four Supreme Court opinions ignore the statutory prescription.[8]

Can it be that the bad habits of public investigation are so ingrained that people just cannot believe that the phrase "it shall . . . receive such evidence or testimony in executive session" truly means that a government agency (or House committee) *shall receive such evidence or testimony in executive session?* The statutory experiment was a worthy one; and it will be sad if by default we are deprived of experience that would help us measure the values of executive sessions, as well as the right "voluntarily to appear as a witness" and the right to demand that requests for "additional witnesses" be considered.

The right to submit statements

Section 102(h) of the Act, which is parallel to House Rule XI(26)(p), provides:

> In the discretion of the commission, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The Commission is the sole judge of the pertinency of testimony and evidence adduced at its hearings.

That language helps ensure that "the record" is complete, and witnesses thus are entitled to explain and rebut their own and others' testimony. It should be noted, though, that an investigatory agency's record is quite different from the record in an adjudication, for there is no requirement that agency action be based on that record. Since the statements must be "brief and pertinent," one wonders why the right to submit them should be subject to

[8] 363 U.S. 420 (1960). The relevance of 102(e) has also been overlooked by commentators. See 74 HARV. L. REV. 120 (1960); 20 LAWYERS GUILD REV. 83 (1960); 35 NOTRE DAME LAW. 440 (1960); 6 HOW. L. J. 86 (1960); The Economist, July 2, 1960, p. 36. At oral argument the Government's attorney told the Court of the Commission's attempts to avoid a public hearing but never did explain why a private hearing would not have sufficed. (Transcript. p. 14.) Also unexplained was this testimony of the Commission's Staff Director: "Not only when it is anticipated testimony may arise which may tend to incriminate someone, but even if it might tend to defame some person in the slightest degree . . . it may call for an executive session. . . ." (p. 34 of Transcript of Record)

"the discretion of the Commission." And many judicial pronouncements indicate that an agency will not be allowed to enjoy the role of "sole judge of the pertinency." [9]

The right to counsel

The organized Bar may not have evidenced sufficient concern with miscellaneous laws and opinions that restrict the right to counsel.[10] Section 102(c) of the Act is an example. It provides, as does House Rule XI(26)(k), "Witnesses at the hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights." There is a question whether those words override the more complete protection of § 6(a) of the Administrative Procedure Act; [11] but apart from that issue is there any reason why a lawyer's advice, ever, should be restricted to his client's "constitutional rights"? The rights a witness ought to know are his *legal* rights, and not all legal rights are constitutional rights. For example, the Constitution does not require that Civil Rights witnesses be questioned only "by members of the Commission or by authorized staff personnel." But paragraph 3(i) of the Commission's rules provides that questioning shall be thus restricted. Surely if the Commission in violation of that paragraph were to allow an antagonistic private lawyer to put questions to a witness, a command that the witness's lawyer not advise as to this other-than-constitutional right would itself be unconstitutional.

Apprisal, confrontation, cross-examination

The Supreme Court ruled in *Hannah* v. *Larche* that a trial court may not enjoin the Commission from holding a hearing at which voting registrars have been subpenaed to testify regarding

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[9] See Slotnick, *supra* note 1 at 397; Notes, 24 U. CHI. L. REV. 740, 746 (1957); 106 U. PA. L. REV. 124, 125 n. 14 (1957); NEWMAN & SURREY ON LEGISLATION (1955) 341-359. *Cf.* paragraph 3(g) of the Commission's rules, a sensible provision aimed at efficiency: "Any witness desiring to read a prepared statement in a hearing shall file a copy with the Commission or subcommittee 24 hours in advance. The Commission or subcommittee shall decide whether to permit the reading of such statement."

[10] See Anonymous v. Baker, 360 U.S. 287 (1959); Kramer, *The Place and Function of Judicial Review in the Administrative Process,* 28 FORD. L. REV. 1, 72; *cf.* ABA Committee Report, *supra* note 3 at 37.

[11] See Newman, *What Agencies Are Exempt from the Administrative Procedure Act?,* 36 NOTRE DAME LAW. ——(1961).

affidavits that they deprived certain citizens of the right to vote, even when the Commission intends to deny those registrars the rights of apprisal, confrontation, and cross-examination.

The breadth of the court's ruling has been criticized,[12] and we will not review the criticisms here. For our survey purposes, however, it is particularly unfortunate (1) that the Court chose to treat apprisal, confrontation, and cross-examination as if they were rights all in one package, and (2) that the Court never told us exactly what it meant by "apprisal." The subpenas the Commission had actually served seem unconscionably vague ("[T]estify what you may know relative to subject matters of inquiry committed by law to the consideration of said Commission . . ."). And § 102(a) of the Act ("The Chairman . . . shall announce in an opening statement the subject of the hearing") scarcely ensures an adequate supplementary notice. Congress and judges would do well to keep in mind the conclusion of the ABA's Special Committee on Individual Rights as Affected by National Security that "The witness should receive proper notice of the subject matter to be considered in the hearing so that he may know generally what the Committee is after, what kind of information he will be expected to face, and what evidence or pertinent information he should produce." [13]

An over-all appraisal

Cartoonists sometimes poke fun at commissions-on-this and task-forces-on-that. Yet we can document a great debt of Congress (and thus of the American people) to commissions whose proposals have guided our legislators well in the enactment of needed laws. The reports of the Civil Rights Commission have reflected the care, competence, and creativity that the best of other commissions have exemplified. Given the complex politics of race relations, one cannot identify any Congressional committee that by any stretch of the imagination could have handled so difficult a task so well.

Nonetheless these questions seem pertinent: (1) When it aims for new legislation should a commission, like a Congressional

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[12] Newman, *The Process of Prescribing Due Process*, 49 CALIF. L. REV. 211 (1961).

[13] Appendix to the ABA Committee Report, *supra* note 3 at 30. I do not know why the Committee limited its formal recommendation as follows: "He should be advised of the purpose of the investigation and furnished with a copy of the resolution which authorized it." Report p. 37.

committee, be encouraged via publicity to attract adherents by pillorying those against whom the new legislation would be aimed? (2) Since it needs access to all facts must a commission, like a committee, be given the power to compel testimony?

That first question is complicated here because the Civil Rights Commission has ignored the Congressional mandate on derogatory information we discussed above. Apart from that default, though, is it proper that observers have been led to predict, for instance, that ". . . the Commission, *through public hearings showing abuses,* may be able to shame southern moderates and spur corrections from within [the South] . . ."?[14] Does a Commission press release properly advise us that "The two-day New Orleans hearings will air complaints by persons from more than a dozen parishes who allege they have been denied the right to register and vote because of their race."?[15] Should an earlier press release proudly have acclaimed these facts?

> [T]he nation has seen dramatic evidence that Negroes have been denied the right to register and vote in six Alabama counties. . . . Commission members are indicating satisfaction with testimony supporting the Alabama complaints. Highlights of the hearing were televised and thoroughly covered by newspapers and other media. . . .[16]

Are these statements in that release appropriate for an agency which, with the Supreme Court's approval, denies rights of apprisal, confrontation, and cross-examination?

> From the testimony of 27 citizens of Macon County, 25 of whom have been refused registration up to fifteen times, and ten

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[14] Symposium, 54 Nw. L. REV. 330, 340 (1959) (italics added).

[15] CCR #115 (Sept. 14, 1960). Two sentences later this release states that "the only object of these hearings . . . [will be] to gather the facts." But to gather facts it surely is not necessary to "air complaints."

[16] NPR-44 (Dec. 12, 1958), which editorializes also that "The election officials recited their excuse for not testifying in a halting manner, requiring coaching and prompting from their attorneys every four or five words." To ensure that the Alabama exposures would be "thoroughly covered by newspapers and other media," a Commission memo to the press of Nov. 28, 1958 announced, "The Commission's Information Section will send to papers not served by wire services a daily release by mail (via air mail to distant points)." Also "by wire to meet your deadline."

Since defamatory, defaming, or incriminating matter must be heard in executive session, oft-expressed concerns *re* newsreels, radio, and TV are of limited relevance. Paragraph 3(k) of the Commission's rules provides that ". . . no witness shall be televised, filmed or photographed during the hearing if he objects on the ground of distraction, harassment, or physical handicap." *Cf.* the ABA Committee Report, *supra* note 3 at 30.

> from Dallas, Barber and Bullock Counties, the public may judge whether or not the right to vote has been denied. The public also may judge the conduct of local and State officials in Alabama, which President Eisenhower at his press conference on Wednesday branded as "reprehensible."

Are those two sentences consistent with the Government's assurance to the Supreme Court, in oral argument, that "the Commission . . . is not making findings as to individual registrars"? (Transcript, p. 36)

In short, is it fitting that men chosen for wisdom, high repute, and potential expertness should engage in press warfare and condemnatory public relations campaigns? Or are such activities—sometimes needed to inform the public and stimulate public opinion [17]—better left to elected legislators who, as a body, we trust will be responsible enough to exploit sensibly the kind of objective report that wisdom, high repute, and expertness can help ensure?

I do not criticize the men who have served on the Civil Rights Commission and its staff. Their dedication and conscientiousness have already been acknowledged, and the publicity they have sponsored was not unanticipated in Congress. (During the Civil Rights debates, for example, one Senator declared that ". . . the Commission can accomplish a great deal in exposing any injustice. . . ." [18]) The intent here is to suggest, for future ad hoc commissions, that Congress in delegating the power to investigate ponder whether public opinion molding by use of derogatory information is appropriately complementary.

We also inquired above whether, because it needs facts, a commission must be given the power to compel testimony. The Civil Rights Commission has relied almost entirely on *willing* witnesses, and on the work of its staff and advisory committees. It has dealt with vast problems of education, housing, voting, and employment. Yet only for the third item—voting—has the Commission in considering the nation's needs evidenced any need of its own for subpenaed data. Even as to voting it issued subpenas only in the Louisiana and Alabama proceedings, and there only to investigate sworn charges of wrongdoing.

Is it significant that, for recommendations on a subject as diffi-

[17] See the Woodrow Wilson statement in United States v. Rumely, 345 U.S. 41 (1953), and also Dean Edward Levi's comment in 18 U. CHI. L. REV. 421 (1951).

[18] 103 Cong. Rec. 13843 (daily ed. Aug. 7, 1957).

cult as civil rights generally, there has been no dependence on compelled testimony? [19] Is it fair to conclude that the Commission has used its subpena power not really to further its "legislative" duties, but to perform an investigative task that truly is more analogous to what grand juries do than what a legislative committee does? Has not this Commission, at least, demonstrated that force applied to witnesses is not essential to ensure the efficient recommending of legislation to Congress? For in only two proceedings were subpenas issued, and the unique Congressional command in both these proceedings was that the Commission "investigate [sworn] allegations . . . that *certain* citizens of the United States are being deprived of their right to vote" (italics added). Further, there has been not the slightest suggestion that any among thousands of people who voluntarily have given information to the Commission did so only because they knew the power to compel testimony was there.

Commissions need interviewers and inspectors and lawyers and experts. Some of them need too the kind of evidence that is obtained only by search warrants and subpenas duces tecum. The search of premises and the seizure of documents are quite different, however, from forced testimony; and in general when it creates an ad hoc agency would not Congress do well to withhold the power to force testimony? [20]

Conclusion

The Civil Rights Commission offers further proof that Congress can be aided immeasurably by non-legislative investigatory bodies.

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[19] The Commission apparently decided to use subpenas only in connection with sworn complaints, though 105(f) of the Act patently applies to "carrying out [all] the provisions of this Act." See Wofford, *The Right to Vote and the Commission on Civil Rights,* 106 Cong. Rec. A1526 (daily edition Feb. 24, 1960) ("This was no Commission to take a broad construction of the Act and go on a fishing expedition."). Even as to sworn complaints the bulk of information that has been submitted to Congress was not acquired as compelled testimony. *E.g.,* see 106 Cong. Rec. 3389-3309, 3405 (daily ed. Feb. 27, 1960).

A fair question as to the enlightenment likely to result from the "circus" the Commission had scheduled for Louisiana is implied in this quotation from p. 3 of Appellees' Brief in Hannah v. Larche: "The Commission proposed to conduct a one-day hearing during which it was to take testimony from some fifty-eight witnesses as well as examine the voluminous records of each of the seventeen registrars which were subpoenaed." *Cf.* pp. 760, 773, and 912 of the Hearings on Civil Rights before House Judiciary Subcommittee No. 5, April 24 and May 1, 1959 (complaints as to the Alabama hearings).

[20] The point is elaborated in Newman, *Procedural Rights in Investigations by*

With respect to procedures, though, the rules provided by Congress have defects; and the Commission's handling of those rules has not been exemplary.[21] Procedure problems could be eased greatly if agencies like this were to refrain from sponsoring derogatory publicity and from issuing subpenas ad testificandum. Further testing of the need for delegating the publicity and subpena powers to these investigatory bodies seems called for.

Federal Agencies (publication forthcoming). See also Watkins v. United States, 354 U.S. 178, 187 (1957): "Seldom, if ever, have these [British] commissions been given the authority to compel the testimony of witnesses. . . ."

[21] Apart from the matters questioned above, the Commission's failure to publish its regulations in the Federal Register seems inexcusable.

"INDEPENDENCE" IN THE INDEPENDENT REGULATORY AGENCIES

By R. W. Lishman

Former Chief Counsel, House Special Subcommittee on Legislative Oversight

Some administrators take the word "independent" at its face value. These people believe and act upon the principle that when Congress has laid down a general objective without providing detailed standards or guidelines, they have discretion to devise the necessary or proper means to reach the objective. The braver, or shall we say more foolhardy, members of this minority group operate on the theory that the essence of their calling is what Mr. Justice Jackson called the "dispassionate and disciplined" exercise of discretionary power. Ex parte attempts from either the White House or Capitol Hill to influence them fall on deaf ears. Fear of retaliation by political, economic or other pressure groups does not paralyze their actions. Such an administrator, however, is lucky to survive his appointed term—unless he is a Joe Eastman or a Bob Moses. The chance of renewal of his tenure is practically nil. Witness, for one example, the fate of former Federal Power Commission Chairman Leland Olds.

At the opposite end of the administrative spectrum are the administrators who operate upon the principle that theirs is chiefly a ministerial function. Unless the statute spells out precisely what they must do, they do next to nothing.

In between these extremes there appears to be a wide variety of administrative ideologists. Some fancy themselves to be political executives. Their actions and judgments are based not upon dispassionate consideration of what is necessary in the public interest, but upon deference to the policies and views of the political party responsible for their appointment. Others are persons who take a leave of absence from private employment. Many of these do so at considerable financial sacrifice and bring to their office vigorous and intelligent championship of the particular segment of the economy from which they came. Still others owe their jobs to intercessions by members of the industry they are supposed to regulate. These are the ones who accept as the norm for regulation that what is good for the most powerful

member of a given industry is to be accepted *ipso facto* as in the public interest generally.

Improvement in the administrative process requires not merely the emergence in larger numbers of administrators of ability and expertness comparable to that possessed by the captains of the industries requiring regulation in the public interest, but, above all, men with the courage of their convictions. Without these qualities, an administrator is rather unlikely to exercise the "cold neutrality of an impartial judge" in those cases where his decision will adversely affect private or political interests. If the legislative and executive branches maintain a hostile attitude toward administrative independence of judgment, it will not be too long before undisclosed lobbyists and pressure groups are in control of the administrative process.

Inevitably, and properly, under our governmental scheme of checks and balances there are clashes between the Executive and the Legislative as to the policies and programs which should be followed by the administrative commissions. Resolution of these conflicts so as not to impair seriously the exercising of impartial, expert judgment by the administrator depends upon the self-restraint and wisdom of the disputing parties and of the administrator himself. Leaving aside the larger question of how we can secure men with a sufficient sense of self-restraint and wisdom in elective posts—what can be done to attract men with these qualities to administrative posts?

If we are to have qualified persons in the administrative service, adequate compensation, tenure and pensions must, of course, be provided. In addition, realistic expense accounts should be established so that the administrator is not susceptible to the expense account blandishments of members of a regulated industry. Congress can do these minimal things. More importantly, Congress and the Executive can do something else. They can recognize that the administrators are there to make decisions in the national public interest, even when that may mean a short run adverse effect upon the local interest of a particular constituency or treading upon the toes of a political campaign contributor.

In our modern scheme of government the administrator must be respected as an independent specialist and be given the unhampered opportunity of reaching open, fair and impartial decisions. This does not mean his actions should be free from both Legislative and Executive scrutiny and correction. It does mean, however,

that the administrator should not be treated as an appendage of either branch of government or as a dispenser of public largess at the behest of either private or political persons.

Consider the slogan "The administrative agencies are arms of the Congress." Does it mean that administrators have really been delegated the power to regulate in the public interest and to do those things requiring daily attention which Congress itself could not do? Or does it mean that there has only been a kind of pseudo-delegation of such power? Does it mean that when a Congressman or a Senator, whether on or off the record, intercedes on behalf of his constituents or political supporters, he is to be yielded to by the administrator on the theory that the Congressman or Senator is the voice of Congress itself? Or is he to be regarded as a spokesman for himself or his constituency and his views weighed impartially in the balance? Does it mean that the vigor and thoroughness with which a sound policy of regulation on a national scale should be pursued is subject to the might of a particular Congressman or Senator who happens to be a member or chairman of an important committee? Does it mean that a half dozen or more congressional committees or subcommittees of both Houses can keep the administrators and their top staff people engaged in a series of hearings covering the same subject matters?

These are some questions any self-respecting man of ability needs to have resolved before undertaking the extremely difficult task of an administrator.

An interesting sidelight on the slogan "The agencies are arms of the Congress" arose recently. In seeking to prevent the furnishing or disclosure of certain agency documents to an investigatory committee, contention was made by one Senator that the agency, far from being an arm of the Congress, was in fact an "arm of the Executive branch" and as such its internal papers were entitled to executive privilege from the prying eyes of the committee. I must exclude myself from discussing the validity of the contention about privilege. I do wish to call attention, however, to the plight of the administrator caught in a political crossfire concerning whose arm he really is. Apparently it does not enter the minds of some of our political mentors that the administrator has two arms of his own which he should be allowed to use in the national public interest.

The relationship of the Executive toward the so-called independent regulatory commissions has not yet been clearly defined.

The Executive, however, seems to sum it up in the slogan that "The agencies are arms of the Executive branch." Through the power of appointment and through budget control there has been constant pressure to bend the independent commissions to the will of the Executive. The President takes an oath that he will faithfully execute the nation's laws. How can he do so, he asks, if he has no control over the policies of these important agencies?

Professor Robert E. Cushman in his book, *The Independent Regulatory Commissions,* cites a number of instances in which the Executive has dominated agency policies and decisions. In 1924 Admiral W. S. Benson, former Chairman of the Shipping Board, testified before a select committee of the House concerning President Harding's domination of the Board. He said:

> "It was, of course, well understood and well known that the relationships between the President and the Chairman were intimate and constant and the Board naturally felt that whatever the Chairman brought to the Board he was expressing the policies of the President in what the Administration wanted. In addition to that, the Board more than once, or if not the whole Board, members of the Board, were called into consultation by the President and he showed his direct and personal interest in trying to develop the situation."

In 1926 Mr. Malcolm M. Stewart, manager of the foreign trade department of the Cincinnati Chamber of Commerce, appeared before the House Merchant Marine and Fisheries Committee and testified:

> "It is not secret that the White House tried to control the Shipping Board. I have copies of letters that the President wrote to the Board, one of them, when he says, 'This is what I understood you were going to do, and this is exactly what I want done.' "

Shipping Board Chairman Albert D. Lasker told a group of newspapermen that the President had advised him that "if any member of that Shipping Board did not go along in harmony with Chairman Lasker in his policies, he, Lasker, should notify the President, and he would discharge such member of the Shipping Board"; that the only reason he appointed any of them except Mr. Lasker was "because the law required it."

Professor Cushman mentions being told in 1936 by a member of the Federal Communications Commission that "the commission had always complied with all orders and requests made of it by the

President, and had never raised any question about its obligation to do so."

President Hoover attempted to control agency policy by the issuance of public statements. On one occasion he announced for the Interstate Commerce Commission's benefit that he thought passenger rates ought to be increased. On another, he expressed his views on "railroad consolidation."

President Franklin D. Roosevelt got around the difficulty of recalcitrant commission members, we are told by Professor Pendleton Herring, "in his characteristically adroit fashion. Placing his key men in the departments was a simple matter, but bringing the independent organization within his control required more ingenuity. The judicial calm of the Interstate Commerce Commission was left undisturbed. But the most able and aggressive commissioner was created Federal Coordinator of Transportation. The United States Tariff Commission was reduced to a harmless condition through the passage of the Reciprocal Tariff Act. The Federal Radio Commission was abolished outright and a New Deal commission tok its place. The President secured the resignation of Hoover's chairman of the Federal Power Commission and added two appointees of his own."

It is familiar history, of course, that FDR's attempt to remove Federal Trade Commissioner W. E. Humphrey later ran into a judicial stone wall. Mr. Humphrey, whose thinking about trade regulation was more in tune with the days of Coolidge Prosperity than with the New Deal, had been notified by the President that

> "I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of the country that I should have a full confidence."

Humphrey resented this attack on the independence of the Federal Trade Commission and his opposition was vindicated by the Supreme Court in *Rathbun* v. *U.S.*

Nor was the Eisenhower administration reluctant to try to impose its views on the independent agencies. Putting aside the intercessions of Sherman Adams on behalf of his friend Bernard Goldfine with the FTC and the SEC, perhaps the classic recent instance of administration pressure is the now infamous Dixon-Yates affair. This contract between the Dixon-Yates private power combine and the Atomic Energy Commission is of interest here

in that it involved four federal agencies of varying degrees of independence: the Atomic Energy Commission, the Tennessee Valley Authority and two of the "Big Six" commissions under our subcommittee jurisdiction, the Federal Power Commission and the Securities and Exchange Commission.

White House pressure, a matter with which our subcommittee was concerned, was widespread and concentrated. Former Budget Director Hughes testified before the Senate Antitrust and Monopoly Subcommittee that the AEC agreed to the contract only after he wrote them a letter which began:

> "The President has asked me to instruct the Atomic Energy Commission to proceed with negotiation with the sponsors of the proposal made by Messrs. Dixon and Yates with a view of signing a definite contract."

Then-Chairman Lewis L. Strauss of the AEC testified before the Subcommittee but refused on grounds of executive privilege to disclose his conversations about the Dixon-Yates contract with the President or with Governor Adams.

Former Commissioner Thomas E. Murray testified that "this Commission was faced * * * back in April with a proposal that was sent to the Bureau of the Budget from the Dixon-Yates group. We were instructed to follow that proposal. We did not have any alternative."

Murray also stated:

> ". . . no one will ever be able to estimate the degree to which top level Commission attention has been diverted from its grave primary responsibilities by an issue only distantly related. And equally unfortunate is the fact that the AEC has been needlessly involved in an issue political in nature with the result that the nonpolitical character and position that the AEC has previously enjoyed has been seriously impaired."

The Federal Power Commission approved the contract despite a contrary recommendation from the Assistant Chief of its Bureau of Law which concluded as follows:

> "I have never reviewed a power contract wherein each and every provision is written in such a fashion that one party has an absolute veto right wherever any adjustment or change is indicated and no provision is made for the resolving of a dispute. The contract gives the impression that the generating company dictated the terms and conditions of the contract, and either AEC was

inept or without any right or opportunity to insist on relative provisions which would spell out the representative rights and circumstances under which an adjustment might be justified and provide for a resolution of any difference that might arise through an established form of negotiation or arbitration. . . . The contract is all one-sided. . . .

The Senate Subcommittee Report examined the administration's "heat" on the SEC:

"Consider also the pressure that the White House was putting on the Securities and Exchange Commission to force the contract through that Agency, and quickly. Sherman Adams, the assistant to the President, phoned SEC Chairman J. Sinclair Armstrong on June 11, 1955, and discussed with him that the House of Representatives was scheduled to debate on June 13, 1955, the bill to provide TVA with $6½ million with which to build transmission lines to an island in the Mississippi River so as to connect with Dixon's lines at the Arkansas border. Linsley and Wenzell were to testify before the SEC on June 13, 1955, and Adams asked and received from Armstrong and his fellow SEC Commissioners an order to the hearing examiner to postpone their scheduled appearance. Thus it was not until June 16, the day the House voted the funds, that the SEC resumed its hearing and heard Linsley and Wenzell testify. This was merely another in a series of contacts that the White House had made with the Securities and Exchange Commission."

* * * * *

"To accommodate the Dixon-Yates interests and conserve the time, the SEC sat en banc and did not have the proceeding heard in the first instance by a hearing examiner. Neither Armstrong nor Demmler were able to name another instance in which the SEC adopted such a procedure."

In my emphasis upon the word "independent" in the phrase "independent regulatory commissions" I have omitted attention to other considerations of perhaps equal importance. The adequacy of the Civil Service Commission law and regulations to provide the trained manpower needed in the higher level positions is one such consideration. The importance of the role of hearing examiners is another. The doctrine of primary jurisdiction and the extent to which certain of the regulatory commissions may, for example, oust monopoly jurisdiction of the Department of Justice, is another. The effect of our conflict of interest

laws in hampering recruitment to public service of men of substance and ability is still another.

The administrative process is designed to attain statutory objectives with a minimum of delay and expense, and with due regard to maintaining a balance between the public interest which it serves and the private interest which it regulates. In the long run, I sincerely believe its success depends upon the vigorous independence of the administrators.

EX PARTE COMMUNICATIONS: THE HARRIS BILL, THE CAB, AND THE DILEMMA OF WHERE TO DRAW THE LINE

By Franklin M. Stone

Hearing Examiner and former General Counsel, Civil Aeronautics Board

No one will quarrel with the position that *improper* ex parte communications should be prohibited. But no one will contend that all ex parte communications are improper. So the real question is "What constitutes an improper ex parte communication?" In other words—where to draw the line. The determination of this question involves a host of legal and practical considerations that combine to create extremely complicated and perplexing problems of far-reaching effect on the manner in which government agencies discharge their statutory duties. Of course, ex parte communications constitute only one medium by which attempts may be made to influence administrative decisions. However, the elimination of these objectionable and unfair communications would be a major achievement and should be an objective of serious concern to anyone who is interested in assuring fair play throughout all stages of the administrative process.

The problem of improper ex parte communications is one of the most difficult to resolve in the general field of ethics in government. The situation is made more difficult because many proposed solutions would require additional steps in agency action with consequent delays, while at the same time the agencies are being subjected to widespread and critical attacks because of the time taken to complete administrative proceedings. Thus, we find ourselves on the horns of a dilemma which prompts the question "Can we have our cake and eat it too?" Can we on the one hand, have more steps, more judicialization, more due process and, on the other hand, still have more expedition? Some will agree that we can have both. I, for one, disagree. But this does not mean that I am in favor of improper ex parte communications! We must ask ourselves how much of a price are we willing to pay for additional safeguards. Where should the line be drawn?

The Congress, administrative agencies, bar associations, prac-

titioners, legal scholars and other interested persons have been studying the problems posed by ex parte communications in order to propose legislation, rules and guidelines to combat them. As one key example, after extensive panel discussions and lengthy hearings in which representatives of various bar associations, practitioners and government officials participated, the House Interstate and Foreign Commerce Committee reported out of Committee on July 1, 1960, H.R. 12731—a bill to promote the efficient, fair, and independent operations of the regulatory agencies under the Committee's jurisdiction. Although the bill did not become law, it could well serve as the prototype for future legislative proposals and hence merits continued study and analysis. Needless to say, the problems with which the Harris bill sought to cope are timeless.

1. The Harris bill, defines ex parte communication to mean any communication where reasonable notice thereof is not given in advance to all interested parties except that a request for information with respect to the status of a proceeding shall not be deemed to be an ex parte communication.

2. The Harris bill states the type of agency proceedings in which ex parte communications are prohibited. This bill would prohibit ex parte communications in cases where agency action is required by law or agency rule to be based on the record of an agency hearing.

3. The Harris bill provides at what stage of an agency proceeding ex parte communications should be prohibited. This bill would prohibit ex parte communications from the time such proceeding has been noticed for hearing or such earlier time as the agency may designate.

4. The bill enumerates the categories of persons who are prohibited from making an ex parte communication. The bill provides that except in circumstances authorized by law, no party nor person acting on behalf of a party shall communicate ex parte with respect to a proceeding, directly or indirectly, with any agency member, officer or employee who is subject to the immediate supervision of the member of the agency or any employee who is charged with the preparation of decisions with respect to the proceedings before the agency. It also provides for a similar prohibition against agency members, officers or employees involved in the decisional process from communicating with parties to the proceeding. It should be noted that these

prohibitions do not apply to ex parte communications made to or by an agency employee who is neither a member, hearing officer nor an employee involved in the decisional process.

5. The bill states what type of ex parte communication should be prohibited. The bill prohibits *all* ex parte communications with respect to a proceeding except status requests and communications made in circumstances authorized by law. The Committee report states that the phrase except in circumstances "authorized by law" will exempt ex parte communications with respect to such matters as requests for subpoenas, adjournments, continuances and the filing of papers. It also states that the words "communication with respect to a proceeding" is not to be interpreted so as to prevent the presentation of factual information which is of general significance with respect to the industry subject to regulation by the agency.

6. The bill provides for the preservation of certain types of ex parte communications. With respect to written ex parte communication, it provides that the recipient shall promptly deliver it to the secretary of the agency, together with a written statement of the circumstances surrounding receipt thereof. It further provides that the communication and the statement shall be placed in the public file of the agency and notice shall be given of such communication to all parties to the proceeding. In the case of any such communication made by an agency member, hearing officer or employee involved in the decisional process, the same procedure shall be followed, except the sender is required to deliver a copy of the communication and a written statement of the circumstances to the secretary. This bill makes no provision for the disclosure or preservation of oral ex parte communications.

7. The bill provides penalties against persons who make improper ex parte communications. The bill provides that a prohibited ex parte communication shall be good cause, *in the agency's discretion,* for disqualification of the party who made the ex parte communication or on whose behalf the ex parte communication was made. It provides further that any person who wilfully violates the ex parte prohibition or the disclosure provisions of the bill shall be fined not more than $10,000 or imprisoned for not more than one year or both.

I would like to discuss the various provisions of the Harris bill that relate to ex parte communications in the light of problems

the Board has had with similar provisions in its Principles of Practice.

Although the problems facing the Civil Aeronautics Board with respect to ex parte communications are not necessarily the exact problems of other agencies, I believe the fundamental principles that are involved are essentially the same. In view of this, I believe the Board's rules relating to ex parte communications will be useful in my analysis of the Harris bill.

In 1951, long before the problem of improper ex parte communications became a newsworthy item on a national level and the subject of Congressional consideration, the Board adopted rules against such communications.

With respect to cases to be determined after notice and hearing, these rules prohibited (1) any private communication on the merits of a case to a member of the Board, its staff or to the examiner in the case by any person, either in private or public life, unless provided by law; (2) any private communication to a member of the Board or the examiner in the case by any member of the Board's staff who participated in the hearing as witness or counsel; and (3) any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board or its staff by giving statements to the press, or radio or by paid advertisements. In order to enforce these rules, the Board provided that it might disqualify and deny, temporarily or permanently, the privilege of appearing or practicing before it to any person who violated these principles.

Recently, in a Board proceeding certain problems arose regarding private communications to the Board and solicitation of support of third persons by parties to a proceeding. In the light of these problems, the Board issued a Notice of Proposed Rule Making which: (1) proposed a rule establishing at what stage the rules would be applicable to an "on the record proceeding"; (2) defined private communications, on the merits; and (3) established guidelines as to what constituted improper solicitation.

In response to this Notice, over 50 C.A.B. practitioners submitted comments and suggestions. The more significant comments and suggestions were: (1) that the Board's rules pertaining to ex parte communications be expanded to include non-hearing cases of an adversary nature; (2) that the Board should provide for a procedure whereby *improper oral communications* be pre-

served and that notice of such communications be given to all parties; (3) that the Board amend its rules to prohibit communications between the Board and staff members, in addition to witnesses and counsel, who participate in the formulation, preparation and presentation of the staff's position; and (4) that the Board amend its rules to the extent that any party who violates them would be deprived of the relief he seeks in the proceeding.[1]

This brief discussion of the Board's rules and proposals pertaining to ex parte communications, as well as the comments of practitioners with respect to these proposals, already points up many areas where differences of opinion exist as to "where to draw the line." A closer examination of the Harris bill and the Board's rules points up even greater differences.

1. The Board's rules against ex parte communications and the Harris bill apply only to proceedings where agency action is required by law to be based on the record of an agency hearing. The comments submitted in response to the Board's Notice urge the Board to expand the applicability of its principles to include non-hearing cases of an adversary nature. In support of this position they contend that certain Board actions which do not by law require a hearing can have a competitive effect upon air carriers equal to or greater than Board actions which are based upon a hearing and a record. The comments specifically refer to the Board's exercise of its exemption authority. Undoubtedly such actions as this, can have a substantial competitive effect throughout the industry or upon individual carriers and procedures should be devised to protect such proceedings. However, does such a justification really go to the problem as to how the Board can protect the judicial character of its "on the record proceedings?" In brief, there does not appear to be any direct relationship between the Board's Principles of Practice and the economic effect which may result from Board action not based upon a hearing. To apply the Board's existing rules to non-hearing cases of an adversary nature may deny the Board access to its staff and the expertise which is the staff's very function. Furthermore, it would certainly delay the exercise of the Board's authority which may not be in the public interest. And on the subject of the Board's exemption authority it is worth noting that the rules of practice

[1] The Board subsequently adopted these proposals as final rules PR-43 (25 F.R. 12430).

provide that any interested person or the applicant for an exemption may request an evidentiary hearing. In the event such a request is granted the rules against ex parte communications would apply. Thus the Board's rules provide adequate procedures by which to protect individual carriers where serious competitive problems are present.

The Harris Committee in its report on H.R. 12731 stated:

"The committee expects that the agencies will adopt procedures and policies which will prevent improper influences in proceedings which are not 'on the record proceedings.' " I am in full accord with this suggestion. However, these procedures in my opinion should not be the same procedures as are applicable to "on the record" cases.

2. The Board's present Principles of Practice as well as proposed amendments and the Harris bill do not require that improper oral communications be preserved or that notice of such communications be given to all parties, although both the rules and the bill prohibit such communications. The practitioners' comments that were received by the Board, however, urge that the Board's rules provide that a written memorandum be made of oral communications and placed in the public file and that notice of such communication be given to all parties to a proceeding. The justification for this proposal is that oral communications are the most perishable and objectionable form of ex parte approach and accordingly should be preserved. It would be naive for me to state that oral communications are not as objectionable as written communications. Unquestionably they are just as much so. However, the objections to such communications must be weighed against the problems inherent in preserving them.

The burden which preservation would place on the Board Members and employees would be substantial. Not only would it frequently be difficult or next to impossible to delineate between matters which are or are not covered by this requirement but it might be impossible to reduce the conversation accurately to writing. From the standpoint of fairness the person making the oral presentation should, but would not have an opportunity to see the written memorandum until after it had been placed in the public file and circulated to other parties. If it were then contended that the memorandum did not properly reflect the oral conversation, fair play would require that an opportunity be given to correct the memorandum. This could only result in further delays in the administrative process.

In brief, I am of the opinion that the disadvantages in preparing memoranda of oral communications outweigh the advantages that may be gained. This, however, does not mean that we should give up on finding a solution to this problem. All will concede that it is a serious problem area and that a solution must be found.

3. The Board's Principles of Practice prohibit any communication between the Board and staff witnesses and counsel in a proceeding determined on the basis of a record. The Harris bill contains a provision which makes the requirement of "separation of functions" contained in section 5(c) of the Administrative Procedure Act applicable to all "on the record proceedings," whether the proceeding involves adjudication or rule making within the meaning of the Act, including those proceedings involving the determination of initial licenses and those involving rate making.

The comments that were received in response to the Board's Notice urge the Board to amend its rules so as to prohibit any communication with it by any staff member who has participated in the formulation, preparation or presentation of the staff's position. In justification of this position they state that such staff members play just as an important role as staff witnesses and counsel and accordingly should likewise be prohibited from communicating with the Board. The Board's present rules go further than required by the separation of functions provision of the APA and are comparable to the provisions of the Harris bill.

Thus, staff witnesses and counsel are in all "on the record proceedings" prohibited from communicating with the Board. The practitioners proposal however, goes much further than the Board's present rules or the Harris bill.

As to where the Board or any agency should draw the line in isolating itself from the expertise of its technical staff is not an easy matter to decide. To a large measure it depends upon the organizational setup of the agency, the functions the agency performs, and the type of information necessary to its deliberations. Of paramount importance, however, is that the agency rules will not have the effect of cutting off its members entirely from the expertise of its staff. To do so may prove costly in terms of efficiency, time and money.

4. The Board's existing Principles of Practice provide that a person who violates its rules may be temporarily or permanently denied the privilege of appearing or practicing before the Board. The Harris bill goes further. It states that a party who violates

the proscription against *ex parte* communications may *at the discretion of the agency* be denied the relief it seeks in a case.

For example, under the Board's existing Principles of Practice the Board may bar an attorney from practicing before it. It may not under its existing statutory authority take any action with respect to the party he represents. However, under the Harris bill the Board would have the power to deny a party the relief he seeks in a proceeding.

Comments received from the persons who practice before the Board support the Harris bill with respect to this penalty. The question may be asked as to whether or not this penalty is too drastic. For example, a carrier may be the sole applicant for a route award. However, because of the impropriety of one of its employees, an improper ex parte communication is sent to the Board. Under the Harris bill the Board could deny the carrier the route award, although it may be in the public interest to grant it. Thus, under the Harris bill the public also is penalized.

It should be noted, that the Harris bill leaves to the discretion of the agency the imposition of the penalty. In view of this the agency would be in a position to consider all mitigating circumstances in the imposition of a penalty.

5. The Board's proposed amendment to its Principles of Practice provides that the principles apply from the time of filing an application or petition which pursuant to law must be passed upon by the Board after notice and hearing, or in case of other matters, from the time of notice by the Board that such a matter shall be determined after notice and hearing and upon a record.

The Harris bill provides that its provisions should apply from the time the proceeding has been noticed for hearing or such earlier time as the agency may designate.

The stage the prohibition against *ex parte* communications should apply is another area where it is difficult to draw the line.

It was the Board's experience in a recent case that most *ex parte* communications were received prior to the time the case was noticed for hearing. Undoubtedly this was a factor in the Board proposing an amendment to its rules setting the time an application or petition is filed as the stage the prohibition against ex parte communications would apply.

The Board's proposal may not be workable or satisfactory in every case. There may be cases where communications between the Board or the Board's staff and parties may be desirable or

necessary, but under the Board's proposal would be prohibited. Possibly, the answer lies in the nature of the communication. Perhaps certain types of ex parte communications, such as request for expeditious treatment of a case, should be prohibited from the time an application is filed, while other ex parte communications should be prohibited from the time the proceeding is noticed for hearing. In any event, the problem is difficult and again raises the question as to where to draw the line.

6. The Harris bill prohibits ex parte communications only to members, hearing officers and employees involved in the decisional process.

This in my opinion is a loophole in the Harris bill. In fact the Committee report stated as much. However the Committee was of the opinion that the various agencies to which the Harris bill would apply discharge not only quasi-judicial but also quasi-legislative and administrative responsibilities. Therefore, it was concluded that it would be unwise to enact legislation which might in effect put these agencies in a straitjacket. Certainly, this is a plausible reason. However, the fact remains that this is a loophole. As to how this loophole can be closed is a matter for each agency to decide. The Board has prohibited ex parte communications to the Board members and all its staff. This to my knowledge has not caused any serious problem. Other agencies with different functions and organization may have different views.

PROGRESS REPORT ON THE CODE OF AGENCY-TRIBUNAL STANDARDS OF CONDUCT *

By Cornelius J. Peck

During the first portion of this 1960-1961 year, the Committee has restricted its activities to consideration of the pending legislative proposals regulating ex parte communications with administrative agencies. The Committee is of the opinion, with some individual expressions of doubt, that the enactment of legislation based upon either S. 2374 (86th Cong., 1st Sess.) or H.R. 12731 (86th Cong., 2nd Sess.) would constitute desirable legislation governing the matters of ex parte communications with administrative agencies. However, upon consideration and evaluation of the two bills, the Committee is of the opinion that legislation based upon S. 2374, which is basically the American Bar Association proposal, would be more desirable than legislation based upon H.R. 12731. In greater particularity, the Committee prefers the redraft of the American Bar Association proposal which it appended to its report to the Council at the 1960 annual meeting to the draft of S. 2374. See 12 Ad. Law Bull. 201, at 203-205.

The principal reason for the Committee's view on the value of the two bills is that legislation based upon H.R. 12731 would affect ex parte communications with only six major agencies, whereas this Committee's redraft of S. 2374 would govern ex parte communications with every agency falling within the definition of agency in the Administrative Procedure Act. The Committee sees no reason why there should not be legislative restraints upon ex parte communications in administrative proceedings of the executive departments as well as such important independent agencies as the Atomic Energy Commission, the National Labor Relations Board, the Renegotiation Board, and the Tariff Commission.

Another major defect in H.R. 12731 is that it requires the reporting and giving of notice only with respect to *written* ex parte communications. Protection of the interests of parties to proceedings would seem to require that they also be given notice of oral and telephone ex parte communications, as provided in the Committee approved draft.

* As with all committee reports, nothing contained herein shall be construed as the action of the American Bar Association unless the same shall have been first approved by the House of Delegates or the Board of Governors.

The Committee does believe that limitation of the prohibitions on ex parte communications to those made in proceedings required by law to be *on the record,* as provided in H.R. 12731, is to be preferred to prohibitions applying to all proceedings which by law are subject to notice and opportunity for hearing. Unless the governing statutes require a determination made on a record, the occurrence of ex parte communications does not appear to be such a departure from the legislative scheme of operation as to justify imposition of criminal sanctions. On the other hand, the presence of such restrictions might well dry up sources of information which are important in supplying an agency with factual information of general significance with respect to the industry subject to regulation by the agency. See House Report 2070, to accompany H.R. 12731, 86th Cong., 2nd Sess., p. 12. Accordingly, the Committee amends its draft as reported at 12 Ad. Law Bull. 203 by adding to the first sentence of Section 3a) the language indicated hereafter by underscoring, so that the sentence will read as follows:

> In agency hearing proceedings which by law are subject to notice and opportunity for hearing and required by law to be based upon a hearing record, the agency's consideration and decision shall be based solely and exclusively upon the matters of record including the notice of hearing, pleadings, evidence and contentions in the proceedings and such matter which has properly been made subject to judicial or official notice.

The Committee is of the firm conviction that the principle of separation of functions in the process of adjudication must be maintained, and that agency personnel engaged in investigative or prosecutory functions should not make ex parte communications to agency members or hearing officers. However, with one member dissenting, the Committee is of the opinion that this principle should not be enforced with criminal sanctions. A government employee's ex parte advocacy of an agency view, however undesirable, does not constitute the opprobrious and venal self-interested conduct which this legislation is designed to prevent. On the other hand, the possibility of imposing criminal liability on government employees might well lead to an internal breakdown in communications at great cost in administrative efficiency. Accordingly, the Committee disapproves of those provisions of H.R. 12731, principally Section 2(4), which would permit the imposition of criminal sanctions on government employees who make ex parte communications on behalf of the agency. Disci-

plinary action with respect to employment appears to constitute a more desirable control of this problem.

The consideration of this problem evoked by H.R. 12731 indicates that conceivably the Committee's draft reported at 12 Ad. Law Bull. 203 might also result in imposition of criminal liability on an agency employee who did no more than violate the principle of separation of functions. To avoid this contingency, the Committee amended its draft by amending Section 6(b) to add the language indicated by underscoring:

> (b) A willful violation of Section 6(a) by any person other than an agency employee acting exclusively on behalf of the agency shall be subject to a fine of not more than $10,000 or imprisonment of not more than one year, or both. A violation of Section 6(a) by an agency employee acting exclusively on behalf of the agency shall constitute grounds for disciplinary action, including discharge.

Section 10 of H.R. 12731 attempts to strengthen the principle of separation of functions by eliminating the last sentence of Section 5(c) of the Administrative Procedure Act. That sentence provides that the subsection shall not apply to the agency or members of the body comprising the agency. Another sentence in Section 5(c) provides that no hearing officer shall be subject to the supervision of any officer engaged in the performance of investigative or prosecuting functions for the agency. Removal of the exemption of the last sentence of Section 5(c) thus raises a question of whether hearing officers may be responsible to or subject to the supervision of agency members who supervise the entire activities of the agency staff, including its investigative and prosecuting functions. See 2 Davis, Administrative Law § 13.06, p. 215. It would seem undesirable to create this problem, and the present provision of Section 10(a) of H.R. 12731 accordingly needs clarification.

A report of the Committee on Administrative Law of the Association of the Bar of the City of New York suggests that communications and summaries of communications should be placed in the public file of the *case* involved rather than in the public file of the *agency*. This Committee agrees with the suggestion and accordingly amends its draft as reported 12 Ad. Law Bull. 203 at 205, by substituting the phrase "the public file of the proceeding" for the present language in the eighth line of Section 5(a) reading "the public file of the agency."

Section 5 of H.R. 12731 requires the issuance of a notice stating whether or not a hearing is an "on the record proceeding," with a proviso that in the event of failure to include this portion of the notice the proceeding shall be deemed to be an "on the record proceeding." The section fails to make clear whether the agency determination is reviewable in any fashion, and likewise fails to state whether the status of the proceeding "deemed" to exist in the event of failure to state the type of hearing is subject to rebuttal. Considering the importance of the ambiguities in a subsequent criminal prosecution, the section needs clarification.

Both Section 7(f) of H.R. 12731 and Section 6(b) of the Committee approved bill fail to make clear whether a willful violation occurs when a communication is made with the intent to influence or whether in addition there must also be knowledge that the provisions of the bill governed the proceeding. It would seem that the making of an ex parte communication in an on the record proceeding with the intent to influence, entirely apart from knowledge of the existence of the proposed legislation and its applicability to the proceeding, is a sufficient departure from acceptable standards to constitute cause for imposition of criminal sanctions. In addition, requiring proof of knowledge that the proceeding was subject to the provisions of the legislation requires proof of a knowledge of law which might constitute an insuperable obstacle to prosecutions. Accordingly, the language of Section 7(f) of H.R. 12731 would be improved by changing it to read:

> (f) Any person who, with the intent to influence any action by an agency or by any member of such agency with respect to the consideration or decision of the proceeding, violates subsection (a), (b), . . .

The Committee has therefore amended Section 6(b) of its draft, as reported at 12 Ad. Law Bull. 205, and as subsequently amended to read:

> A [~~willful~~] violation of Section 6(a) *committed* by any person, other than an agency employee acting exclusively on behalf of the agency, *with the intention of influencing any action by an agency or by any member or employee of such agency with respect to the consideration or decision of the proceeding* shall be subject to a fine of not more than $10,000 or imprisonment of not more than one year, or both. A violation of Section 6(a) by an agency employee acting exclusively on behalf of the agency shall constitute grounds for disciplinary action, including discharge.

LIMITATIONS ON AGENCY REVIEW: THE PROPOSED NLRB RULES

By Victor G. Rosenblum and Ruth Smalley

The most significant contribution to the administrative process in the proposals of the Jenkins Committee to revise the NLRB's rules is the effort to limit the scope of agency review through the delineation and application of standards that are both desirable and workable. These standards would limit agency review of exceptions to trial examiner's decisions to the following grounds:

> "(1) That any finding of material fact is unsupported by the preponderance of the evidence and prejudicially affects the rights of the party filing the exceptions, designating all relevant portions of the record;
>
> "(2) That any necessary legal conclusion is a departure from or contrary to established and cited Board precedent;
>
> "(3) That a substantial question of law is raised by any necessary legal conclusion in view of (a) the absence of Board precedent therefor, (b) inconsistencies or uncertainties in cited Board decisions, or (c) conflict between cited Board and court decisions;
>
> "(4) That the exceptions raise a substantial and important question of administrative policy or discretion, specifying in detail the nature thereof;
>
> "(5) That the conduct of the hearing or the preparation of the initial decision involved a prejudicial procedural error, specifying in detail the nature thereof and designating portions of the record, if appropriate."

Filtering and channeling exceptions to initial decisions through standards like those proposed by the Jenkins Committee could help to achieve such salient objectives in agency review as:

1. to permit responsible decision-making by agency heads on important matters, eliminating consideration of trivia by them;

2. to direct and control the "institutional" decisional process so that agency heads can play key roles in practice as well as theory in the development, explanation, and implementation of agency policies;

3. to encourage utilization of rule-making procedures for the development and enunciation of basic agency policies and programs required or authorized by law;

4. to encourage application and clarification of agency rules, pursuant to the intent of Congress, in agency adjudications;

5. to minimize, if not to eliminate, the efficacy of *ex parte* attempts to influence decisions, by making it feasible to place and keep on the record those matters which may be subject to agency review;

6. to pinpoint the issues which may be subject to judicial review;

7. to expedite, through eliminating the justification for many agency delays, the process of "exhaustion of administrative remedy" in order to qualify for judicial review in appropriate cases.

The standards proposed by the Jenkins Committee were based on (1) the Rules of Practice before the Supreme Court of the United States, substituting conflict in Board precedent for conflicts among circuits and making other modifications to accommodate for the differences between agency and court review; and (2) specific legislative proposals for similar limitations by the Senate Advisory Committee on "Organization and Procedure of the National Labor Relations Board," Sen. Doc. 81, February 2, 1960, 86th Cong., 2nd Sess., Sec. 10(d) at p. 24. That recommendation had the unanimous approval of the Advisory Committee, which was composed of labor law and administrative law specialists, including David L. Cole, Guy Farmer, Arthur Goldberg, Charles Gregory, Denison Kitchel, Plato E. Papps, Gerard Reilly, Louis Sherman, Russell L. Smith, George W. Taylor, W. Willard Wirtz, and Archibald Cox, Chairman. The Labor Law Section of the American Bar Association endorsed the proposals in Sen. Doc. 81 at the 1960 annual meeting.

The Labor Committee of the Administrative Law Section reported at the 1961 mid-year meeting that it was "strongly opposed to the notion that the NLRB should limit the nature and type of exceptions it will entertain from intermediate reports."

Chairman Milton Denbo of the Labor Committee pointed out that "while the Committee appreciates Mr. Jenkins' commendable desire to lighten the great load of the Board, it does not believe that is sufficient justification to deprive parties of their right to a decision by the Board rather than by simply a trial examiner. Virtually every unfair labor practice case before the Board involves an issue on which different examiners might reach different conclusions. This is true whether the case involves union domination

by an employer, discriminatory discharges, refusal to bargain, restraint or coercion of employees, secondary boycotts, or any of the other unfair labor practices spelled out in the statute. To allow the trial examiner's decision to be final in any of these cases is to confer upon the trial examiner power even beyond that of a U.S. District Court Judge, whose decisions can be appealed as a matter of right to a U.S. Court of Appeals. In this connection it should be remembered that as a practical matter trial examiners have tenure for life, while Board members are appointed by the President for only a term of five years, may be removed, and are often replaced when their terms expire.

"Furthermore, at present, the major restraint upon the examiner is his knowledge that his decisions are subject to review. Should such review be limited, the judicial quality of examiner's decisions would, the Committee thinks, be adversely affected.

"The foregoing is without reference to whether the Board has legal authority to limit its review of Intermediate Reports in the manner suggested by Mr. Jenkins. Such legal authority is questionable in view of Sec. 10(c) of the National Labor Relations Act, which plainly contemplates the right of a party to take exceptions, without limitations, to an examiner's report."

This critique by Mr. Denbo's committee merits serious consideration since the right to review is an integral component of any democratic system of administration and should not casually be restricted. At the same time, we feel that the criticisms overlook the palpable advantages of the proposal and deny full effect to the agency's powers under the APA.

The Final Report of the Attorney General's Committee on Administrative Procedure pointed out the desirability of limiting review. It stressed that the decision of the hearing officer should serve as the "initial adjudication of most cases, and the final adjudication in many, just as does the decision of a trial court." It urged that "the specific grounds of appeal should be required to be stated so that the review of a hearing commissioner's decision may be limited accordingly." Believing that a uniform rule was inadvisable, the Committee left the scope of review for later definition by the agency but added (Final Report, 1941, pp. 51-52):

> "It should be made plain by statute that where an appeal is based upon allegedly erroneous determinations of facts by the hearing commissioner, the agency may permissibly, but is not required to, confine its examination of the record to the portions

cited and may reject that ground of appeal unless those portions disclose that the finding is clearly wrong. In other words, mere allegations of error without convincing support should not impose on the agency heads the duty of reading the entire record.

"The Committee strongly urges that the agencies abandon the notion that no matter how unspecified or unconvincing the grounds set out for appeal, there is yet a duty to reexamine the record minutely and reach fresh conclusions without reference to the hearing commissioner's decision. Agencies should insist upon meaningful content and exactness in the appeal from the hearing commissioner's decision and in the subsequent oral argument before the Agency. Too often, at present, exceptions are blanket in character, without reference to pages in the record and without in any way narrowing the issues. They simply seek to impose upon the agency the burden of complete reexamination. Review of the hearing commissioner's decision should in general and in the absence of clear error be limited to grounds specified in the appeal." [Emphasis supplied.]

The authority to specify grounds for the appeal and to limit the issues on review was vested with the agencies by Sec. 8(a) of the Administrative Procedure Act which provides in pertinent part:

> "On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision." [Emphasis supplied.]

Explaining this authority, the Attorney General's Manual on the Administrative Procedure Act (1947), p. 84, points out:

> "That is, an agency may limit the issues which it will consider in such cases by notice in a particular case or by a general rule published in the Federal Register. It may restrict its review to questions of law and policy, or where it is alleged that erroneous findings of fact have been made by the hearing officer, to determine whether cited portions of the record disclose that the findings are clearly wrong." [Emphasis added.]

The reference to Section 10(c) of the National Labor Relations Act in the Denbo report is clearly correct in its contemplation of "the right of a party to take exceptions without limitations, to an examiner's report." But the right of a party to take exceptions cannot be construed as the obligation of an agency to review all exceptions taken. Section 10(c) of the NLRA in no way detracts

from the agency's powers under 8(a) and 12 of the APA to limit the scope of review. As the late Senator Taft pointed out, 10(c) was designed "to lessen the work load of the Board and facilitate its disposition of cases" by giving finality to recommended orders of trial examiners without Board review if no exceptions were taken within 20 days. (2 Legislative History of the Labor-Management Relations Act, 1946, p. 1625.) Section 10(e) of the Act makes the taking of exceptions to an examiner's report a requirement for review of such exceptions by the courts; but nothing in the Act requires or contemplates that the Board itself will review every exception.

Finally, the critique of the Jenkins proposal fails to consider the real limitations imposed on responsible and systematic agency review by time, budget and personnel factors.

Limited staff, limited budget and limited time—which are some of the realities with which administrators must cope—make unlimited agency review an appealing but unattainable goal at best. The choice is not between unlimited and limited agency review; rather it is between types of limitations on review. The limits may be the product of the rational channeling of issues for review according to standards promulgated by the agency after due notice and hearing, or they may emerge through inordinate and expensive delays, through ill-considered and transitory judgments, or through illicit ex parte influences. A major potentiality of the Jenkins proposals is the balancing of agency case loads with personnel, budget and time realities through the delineation and application of fair and practicable standards rather than through arbitrary or ethically questionable modes of conduct.

PROPOSALS FOR CHANGES IN APPEALS PROCEDURES AT THE DEPARTMENT OF INTERIOR

By Robert L. McCarty *

In reporting to the Section last August the Committee on Natural Resources and Interior Matters noted meetings and discussions with the then Solicitor of the Department of the Interior, George W. Abbott, and the fact that he had instituted a comprehensive study of the appeals system. Mr. Abbott was later appointed an Assistant Secretary of the Department and Theodore F. Stevens was named Solicitor. Prior to their leaving the Department in January 1961, I requested they make available to the Committee the results of the study which had been made, together with some statement summarizing the factors taken into consideration.

There follows Secretary Abbott's reply to my inquiry (Appendix A), together with material intended to be published in the Federal Register as proposed rule making, designed to implement the plan evolved. In brief, the proposal is in two parts: (1) the establishment of an Appeals Division under a Deputy Solicitor who would have no other responsibility than to be the ultimate adjudicator in the Department (Appendix B); and (2) the elimination of appeals to the Director of the Bureau of Land Management (Appendix C). The fashion in which the existing rules would be changed is shown in Appendix D. As will be noted from the letter of February 1 from the newly appointed Solicitor, Frank J. Barry (Appendix E), even though the material is not to be published in the Federal Register, he is keenly interested in having the views of the Bar. Finally, in a second letter from Solicitor Barry (dated February 7, Appendix F), we are asked to consider two other proposals related to the decision making processes of the Department, including a certiorari-like approach under which Secretarial review would be discretionary.

There is thus before us a matter of unique interest to all members of the Section. We are here concerned with efforts to deal with the separation of functions and other problems, not in a regulatory agency as most of us know them, but in a Cabinet Department of the government; and at the same time with widely

* Chairman, Committee on Natural Resources.

differing approaches to streamlining the existing system of appeals by in effect cutting out one level of appeal.

To offer some perspective for viewing the proposals it may be recalled that what is now the Committee on Natural Resources has long concerned itself with the improvement of procedures at the Department of Interior. Two major objectives, approved by the Section in 1954, were that the Department should follow the rule making provisions of the APA in all matters of general public interest relating to the public lands; and that a hearing should be provided under the APA for cases arising under the jurisdiction of the Bureau of Land Management when requested by a person feeling himself aggrieved by an initial decision at the Land Office level. In short, a hearing, if requested, on appeal.

The first objective, *i.e.* rule making, has been substantially realized. The Department has made an excellent effort in this regard and at the present, even though claiming exemption under the APA, any changes in regulations or the promulgation of new regulations of general interest are published as proposed rule making. This has not been a pro forma performance. Suggested changes have been carefully considered. The most recent evidence of this is in connection with the sweeping Mineral Leasing Act Revisions of 1960 (Act of September 2, 1960, 74 Stat. 781). On October 7, 1960 the Department published changes in the regulations as proposed rule making (26 F.R. 9647) to implement this new law. Comment was received from many sources. An interim order was issued to permit leasing to continue, subject to certain conditions, while work on the new regulations continued. Publication was withheld, however, to permit the new Administration an opportunity for appraisal in the light of the many comments received.

The second objective, allowing a hearing on appeal if applied for, remains substantially unachieved although there have been gains. For example, the Secretary in 1956 recognized that mining claims contests should be subjected to the hearing provisions of the APA and established a system of Field Commissioners to handle this. (See *U.S.* v. *O'Leary,* 63 I.D. 341.) Also, in new rules promulgated in 1956 the Department provided that hearings might be ordered by the Director, BLM, on appeals, either at the request of a party or on his own motion, on questions of fact. This was regarded very hopefully but despite the many cases of sharp factual conflict, the authority to get at the facts through hearings has been used but once.

There are a number of factors which make the hearing goal in all cases difficult of accomplishment, not the least of which is the growing volume of appeals. In fiscal 1959, out of some 4600 appeals disposed of by the Director, 426 were in turn appealed to the Secretary. The practical problem thus is whether the ideal of a hearing in each controverted case can be achieved without hopeless administrative expense.

While the proposals which follow do not appear to provide any solution for the problem of hearings, they do suggest far-reaching, and somewhat allied ideas. The main thrust of the Abbott proposal (utilized in part in a variation which Solicitor Barry would like considered) is to consolidate and insulate the appellate jurisdiction in the Office of the Solicitor for administration by a Deputy Solicitor having no other responsibility. One purpose here is to attempt to solve the separation of functions problem, practitioners feeling that inasmuch as the Solicitor, as chief legal officer, must render advice to the various Bureaus of the Department, he perforce meets a matter on appeal which he has already prejudged. (See Committee Report, 12 Ad. Law Bull. 279.) The insulation now proposed in a Deputy Solicitorship appears, in part at least, an effort to meet this. Furthermore, if appeals to the Director of the Bureau of Land Management are eliminated (as is also suggested) there may be a better possibility of the problem arising in the newly proposed Appeals Division in the Solicitor's office as a new and previously unreviewed matter.

Your Committee has found over the years that it has been able to gain a number of desirable changes in Departmental procedures. Even though not reaching all of its goals, your Committee's efforts have been cordially and thoughtfully received. The proposals advanced below have received extensive study in the Department and should have the close attention of our Section. Inasmuch as these proposals involve rather sweeping changes, with competing approaches (eliminate appeals to the Director, Bureau of Land Management, *or* retain them but cut down appeals to the Secretary, through certiorari) they provide an opportunity for us to review the entire appellate structure in the Department and to give that Department the benefit of our thinking.

Although the Committee on Natural Resources will study this matter, all members of the Section are urged to submit their views. Of course each person is entitled to send his views directly to the Solicitor, if he prefers, but if this is done your Committee would

greatly appreciate receiving a copy of your views, to assist it in its own deliberations. Here is an opportunity to make a real contribution upon cordial invitation from the Department, with grist for the mill before you in the following pages.

APPENDIX A

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D.C.
Jan. 6, 1961

Robert L. McCarty, Esq.
Chairman
Committee on Natural Resources
1200 Tower Building
Washington 5, D.C.

Dear Mr. McCarty:

This is in response to your request of December 16, 1960, for additional information regarding the establishment of an Appeals Division in the Department of the Interior. Your Committee has already commented generally on this matter. (12 Ad. Law Bull. 285-87.) Since our meeting of a year ago, we have undertaken to implement the major goals mentioned; namely, (1) to create an Appeals Division in which would be housed all the appeals functions of the Office of the Solicitor and, eventually, of the entire Department; (2) to more clearly separate the legal advisory functions of the Solicitor's Office from the Departmental decision making process, particularly in those cases required to be heard in accordance with sections 5, 7 and 8 of the Administrative Procedure Act; and (3) eventually to create only one level of appeal within the Department.

As you know, a special assistant to the Solicitor was appointed whose primary duty was the planning, organization and programming of the Appeals Division. By summer of 1960, matters had crystallized. Secretarial approval for the Division was secured on July 23, 1960. The proposal to eliminate all appeals to the Director, Bureau of Land Management, and to provide for a direct appeal to the Secretary from decisions of officials of that Bureau was also approved as a desirable adjunct to the creation of the Appeals Division. It was felt that appellants should not be required to take *two* appeals before exhausting their administrative remedies. A prolonged two-level appeal process imposes inordinate costs upon appellants and makes for long delays before final agency action is taken. The duplication of time, effort, and expense in the handling of cases which are appealed both to the Director and to the Secretary should be eliminated.

Organizationally, the Division of Appeals was to be established within the Office of the Solicitor under the direction of a Deputy Solicitor for Appeals. Initially, there were to be three branches within the Division—Branch of Land Appeals, Branch of Claims and Contract Appeals, and Branch of Indian Appeals. With this structure, a more clear-cut separation of the adjudicatory and legal functions of the Solicitor's Office would have been realized while, at the same time, there would have been a better utilization of manpower in meeting shifting workloads in the several appeals areas. It would have permitted ready adjustment to future amendments in the law governing administrative adjudications, the establishment of uniform rules of practice and a centralized docket, standardization in handling of oral and written inquiries relating to appeal and claim matters, greater sensitivity in reacting to constructive criticism from responsible members of the bar and the public who are interested in the Department's appeals program, and, when functioning properly, economy in the costs of administration while, at the same time, a speed-up in the appeals process.

By the fall of 1960, the structure of the Division had taken shape. Advanced consideration had been given to selection of the Deputy Solicitor for Appeals and an Assistant to the Deputy. The individuals designated had together hammered out the myriad of details attendant the organizational change, including the consolidation of the appeals functions of the Bureau of Land Management. Proposed changes in the rules of practice, Part 221 of Title 43, Code of Federal Regulations, had been drafted. The primary purpose of these changes was to eliminate appeals to the Director, Bureau of Land Management. Planning and design of a centralized docket and public reference section had been completed. Case flow studies had been made. Docket control cards had been printed. Personnel planning and staffing and program responsibilities had all been worked out. A plan for the orderly transition of the appeals functions to the Appeals Division had been blueprinted, including such housekeeping details as finding additional space, movement of furniture and equipment, etc. In short, the Division was ready "to get off the ground"; but by the time all this work had been completed, it was well into the fall—in fact, very near election time. Because of our concern that any pre-election action might be viewed as inspired for partisan purposes, a decision was made to postpone further action on establishment of the Appeals Division and modification of the appeals procedure until after the election.

After the many months of concentrated effort on appeals reorganization proposals and with the benefit of conversations with several of our predecessors, the views of you and your associates, and other practitioners before the Department, we had concluded and we feel

now that the two steps proposed would make a very significant and constructive contribution to sound appeals procedure. We were convinced by all our study that the proposals represent a step forward, but we were hesitant to commit a new Administration, of whatever political party, to the course we had settled upon. It was our feeling that the steps proposed are so important that under no circumstances —including the possibility that a new Secretary and a new Solicitor might have other ideas as to details—should we risk prejudicing assurance that some early action along the general lines proposed would be taken.

A summary of the situation thus emerges: Prior to August 1959 and over a period of many months, there was in the Office of the Solicitor and the Appeals Unit of that Office, as well as in the Office of the Assistant Secretary for Public Land Management and in the Appeals Unit of the Bureau of Land Management, a continuing study and assessment of the appeals procedure and organization under way. With the designation of a Special Assistant in the Office of the Solicitor in August 1959 for that purpose, the groundwork was laid for bringing together and evaluating the results of the earlier studies. Thereafter, under the coordination and direction of the Special Assistant, the planning details described above were settled upon after many hundreds of man-hours of effort. The general proposals settled upon, *i.e.*, establishment of an Appeals Division and modification of the appeals process, have the enthusiastic support of three present or former chief legal officers of this Department. My predecessor as Solicitor and now Under Secretary, Elmer F. Bennett, as well as the present Solicitor, Theodore F. Stevens, concur in the general plan as outlined. I fully support the detailed plans as worthy of early consideration as proposed rule making for the Department. In this, Under Secretary Bennett and Solicitor Stevens join me.

In light of the foregoing, we have determined upon this course of action: The material enclosed, drawn in the form of proposed rule making to implement both plans, appropriately signed and prepared for publication in the Federal Register, will be presented to the incoming Administration. I would suggest that it be published in the Federal Register so as to permit the incoming Administration to benefit from the views of the general public and to determine on the basis of those views and their own consideration what changes in detail, if any, should be effected. Whatever the decision, I feel it appropriate to release the material to your Committee for study because of the interest the Committee has shown and because this provides a forum among practitioners of experience before the Department whose views will I am sure be useful.

Let me add, only from a personal standpoint, that my several

months' tour of duty as Assistant Secretary—Public Land Management has served to reinforce my conviction, from an administrative perspective, of the soundness of the changes proposed.

Please rest assured that those of us who are leaving posts in the Administration will be available to our successors and to you and your Committee associates for consultation regarding these proposals.

Let me take this opportunity once more to thank you and the Committee on Natural Resources and Interior Matters of the Administrative Law Section, American Bar Association, for the very helpful continuing cooperation given this Department in the several important natural resource areas dealt with by your Committee.

With best personal regards.

Sincerely yours,
GEORGE W. ABBOTT
Assistant Secretary

APPENDIX B

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON 25, D.C.

CREATION OF DIVISION OF APPEALS—OFFICE OF THE SOLICITOR

Basis and Purpose. Notice is hereby given that pursuant to the authority vested in the Secretary of the Interior by section 161, Revised Statutes (I U.S.C. 22) and Reorganization Plan No. 3 of 1950 (15 F.R. 3174, 64 Stat. 1262) it is proposed to establish a Division of Appeals in the Office of the Solicitor.

While the organization of the Office of the Solicitor is a function of the Department not generally of interest to the public, this proposed change in the organization of the Office of the Solicitor is a step of major importance. The matter appears, therefore, to be of interest to the public and to the members of the Bar in particular, and it is felt that the Department will benefit from their views.

The proposal is to create a Division of Appeals in the Office of the Solicitor under the supervision of a Deputy Solicitor for Appeals. The present functions of the Branch of Land Appeals and the Branch of Claims and Contract Appeals (including the Board of Contract Appeals) would be transferred to the proposed Division of Appeals. The appeals functions of the Branch of Appeals and Litigation, Division of Indian Affairs also would be transferred to the Division of Appeals.

The Division of Appeals would be composed of three branches, namely, the Branch of Land Appeals, Branch of Claims and Contract Appeals, and Branch of Indian Appeals.

The purpose of this change in the organization of the Office of the Solicitor is to provide greater flexibility to meet shifting workloads, better efficiency and economy both in time and of money, uniform systems for docketing and processing appeals, and a more clear-cut separation in the Office between the adjudicatory and legal functions.

Interested persons may submit written comments, suggestions, or objections with respect to the proposed changes in organization of the Office of the Solicitor, to The Solicitor, Department of the Interior, Washington 25, D.C., within sixty days of the date of publication of this notice in the Federal Register.

SECRETARY OF THE INTERIOR

APPENDIX C

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON 25, D.C.

[43 CFR Part 62, 63, 67, 75, 76, 79, 107, 115, 119, 146, 149, 150, 160, 161, 185, 201, 202, 221, 244, 250, 251, 254, 257, 259, 270, 292, 296]

APPEALS TO DIRECTOR, BUREAU OF LAND MANAGEMENT—ELIMINATION

Basis and Purpose. Notice is hereby given that pursuant to the authority vested in the Secretary of the Interior by section 2478, Revised Statutes (43 U.S.C. 1201) and Reorganization Plan No. 3 of 1950 (15 F.R. 3174, 64 Stat. 1262) it is proposed to eliminate appeals to the Director, Bureau of Land Management.

As a desirable adjunct to the creation of a Division of Appeals in the Office of the Solicitor it is proposed to eliminate appeals to the Director, Bureau of Land Management and provide for a direct appeal to the Secretary from decisions of officials of that Bureau. There will be an increase in the workload of the Office of the Solicitor in regard to adjudicatory functions which will be handled by the new Division of Appeals.

The proposed amendments to the Rules of Practice and to the related Parts of Title 43 of the Code of Federal Regulations will merely eliminate appeals to the Director, Bureau of Land Management, and provide for a direct appeal to the Secretary from decisions by officials of that Bureau.

The present two-level appeals process imposes inordinate costs upon appellants and makes for long delays before final departmental action is taken. It is believed that the proposed one-level appeal would help to correct that situation.

Interested persons may submit written comments, suggestions, or objections with respect to the proposed amendments to the Code of Federal Regulations, to The Solicitor, Department of the Interior, Washington 25, D.C., within sixty days of the date of publication of this notice in the Federal Register.

The proposed amendments to the Code of Federal Regulations are set forth below.

SECRETARY OF THE INTERIOR

APPENDIX D

UNITED STATES
DEPARTMENT OF THE INTERIOR
WASHINGTON 25, D.C.

CODE OF FEDERAL REGULATIONS
TITLE 43—PUBLIC LANDS: INTERIOR

Chapter I—Bureau of Land Management, Department of the Interior

SUBCHAPTER A—ALASKA

PART 62—FUR FARMING
PART 63—GRAZING
PART 67—INDIANS AND ESKIMOS
PART 75—SALES AND LEASES
PART 76—SCHOOL LAND RESERVATION: GRANT FOR UNIVERSITY
PART 79—TIMBER

SUBCHAPTER B—APPLICATIONS AND ENTRIES

PART 107—CONFIRMATIONS

SUBCHAPTER C—AREAS SUBJECT TO SPECIAL LAWS

PART 115—REVESTED OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS BAY WAGON ROAD GRANT LANDS IN OREGON
PART 119—CHOCTAW-CHICKASAW LANDS, OKLAHOMA

SUBCHAPTER G—EXCHANGES

PART 146—EXCHANGES OF PRIVATELY OWNED LANDS UNDER TAYLOR GRAZING ACT
PART 149—EXCHANGES FOR THE CONSOLIDATION OR EXTENSION OF INDIAN RESERVATIONS OR INDIAN HOLDINGS
PART 150—EXCHANGES TO ELIMINATE PRIVATE HOLDINGS FROM NATIONAL PARKS AND NATIONAL MONUMENTS

SUBCHAPTER H—GRAZING

PART 160—GRAZING LEASES
PART 161—THE FEDERAL RANGE CODE FOR GRAZING DISTRICTS

SUBCHAPTER L—MINERAL LANDS

PART 185—GENERAL MINING REGULATIONS
PART 201—MINERAL DEPOSITS IN THE OUTER CONTINENTAL SHELF
PART 202—RIGHTS-OF-WAY FOR PIPE LINES ON THE OUTER CONTINENTAL SHELF

SUBCHAPTER P—PRACTICE

PART 221—RULES OF PRACTICE

SUBCHAPTER S—RIGHTS-OF-WAY

PART 244—RIGHTS-OF-WAY OTHER THAN FOR RAILROAD PURPOSES AND FOR LOGGING ROADS ON THE OREGON AND CALIFORNIA AND COOS BAY REVESTED LANDS

SUBCHAPTER T—SALE, LEASE, OR USE, AND ACQUISITIONS

PART 250—PUBLIC SALES
PART 251—AIRPORTS AND AVIATION FIELDS
PART 254—SALE, GRANT, OR LEASE OF PUBLIC LANDS FOR RECREATION AND PUBLIC PURPOSES
PART 257—LEASE OR SALE OF SMALL TRACTS, NOT EXCEEDING FIVE ACRES, FOR HOME, CABIN, CAMP, HEALTH, CONVALESCENT, RECREATIONAL, OR BUSINESS SITES
PART 259—DISPOSAL OF MATERIALS

SUBCHAPTER U—STATE AND RAILROAD GRANTS

PART 270—STATE GRANTS FOR EDUCATIONAL, INSTITUTIONAL, AND PARK PURPOSES

SUBCHAPTER Y—WATERS

PART 292—PUBLIC WATER RESERVES

SUBCHAPTER Z—WITHDRAWALS, RESTORATIONS, AND CLASSIFICATIONS

PART 296—CLASSIFICATIONS

Revision of Rules of Practice

1. Sections 62.14, 63.23, 67.9, 75.12, 75.36, 76.18, 79.12, 79.25, 115.179, 119.13, 146.8(c), 149.8, 150.6m, 160.23, 185.152, 201.150, 202.13, 244.20, 244.92, 250.13, 251.16, 254.15, 257.20, 259.72, 270.6, 292.23, and 296.9 are repealed.

2. Section 107.2 is amended to read as follows:

§ 107.2 *Cases subject to equitable adjudication.* The cases subject to equitable adjudication cover the following:

All classes of entries in connection with which the law has been substantially complied with and legal notice given, but the necessary citizenship status not acquired, sufficient proof not submitted, or full compliance with law not effected within the period authorized by law, or where the final proof testimony, or affidavits of the entryman or claimant were executed before an officer duly authorized to administer

oaths but outside the county or land district in which the land is situated, and special cases deemed proper, where the error or informality is satisfactorily explained as being the result of ignorance, mistake, or some obstacle over which the party had no control, or any other sufficient reason not indicating bad faith, there being no lawful adverse claim.

3. Paragraph (d) of section 146.8 is redesignated as paragraph (c).

4. Paragraph (e) of section 161.5 is amended to read as follows:

(e) *Diminution of available Federal range.* Federal range lands to be used under a license or permit are subject to classification and disposition under the provisions of sections 7 and 14 of the act, and to withdrawal, appropriation, selection, or other disposal under the public land laws. Reasonable notice of a pending or proposed classification, withdrawal or other disposal which might result in a diminution of the available Federal range will be given to the licensee or permittee of such lands, consistent with section 296.3 of this chapter, and subject to the right of appeal to the Secretary of the Interior as may be provided in such notice and the rules of practice, Part 221 of this chapter.

5. Subparagraph (6) of paragraph (i) of section 161.6 is amended to read as follows:

(6) Any adverse action by the range manager on an application for suspension of a license or permit under this paragraph may be appealed by the licensee or permittee to the Secretary of the Interior in accordance with the rules of practice, Part 221 of this chapter.

6. Subparagraph (1) of paragraph (c) of section 161.10 is amended to read as follows:

(1) The examiner is vested with the duty and general authority to conduct the hearing in an orderly, impartial and judicial manner, including authority to subpoena witnesses, recognize intervenors, administer oaths and affirmations, call and question witnesses, regulate the course and order of the hearing, rule upon offers of proof and the relevancy of evidence, and to make findings of fact, conclusions of law, and a decision. The examiner shall have authority to take or to cause depositions to be taken. Subpoenas, depositions, the attendance of witnesses, and witness and deposition fees shall be governed by Part 221 of this chapter, to the extent that part is applicable.

7. Paragraph (e) of section 161.10 is amended to read as follows:

(e) *Findings of fact and decision by examiner; notice; submission to Secretary for decision.* (1) As promptly as possible after the time allowed for presenting proposed findings and conclusions, the examiner will make findings of fact and conclusions of law unless waiver has been stipulated, and will render a decision upon all material issues of fact and law presented on the record. In doing so he may adopt

the findings of fact and conclusions of law proposed by one or more of the parties if they are correct. He must rule upon each such proposed finding and conclusion. The reasons for the findings, conclusions and decisions made shall be stated, and along with the findings, conclusions and decision, shall become a part of the record in any further appeal. A copy of the decision shall be sent by registered or certified mail to the appellant and all intervenors, or their attorneys of record.

(2) The Secretary may require, in any designated case, that the examiner make only a recommended decision and that such decision and the record be submitted to the Secretary for consideration. In such instances the Secretary shall make the initial decision which shall constitute the decision of the Department.

8. Paragraph (f) of section 161.10 is amended to read as follows:

(f) *Appeal to the Secretary; furnishing copies of the transcript.* Any party, including the state supervisor or his representative may appeal to the Secretary from an examiner's decision and any party, except the state supervisor or his representative, may appeal from a decision of the Director in accordance with Subpart A of Part 221 of this chapter. Upon request copies of the transcript will be furnished to the state supervisor without charge, and to other appellants and to the intervenors, at a charge of ten cents per folio, except that upon a sufficient showing to the examiner, supported by an affidavit, that an appellant or intervenor is financially unable to pay such fee, a copy will be furnished him without charge.

9. Paragraphs (g) and (h) of section 161.10 are repealed.

10. Paragraph (i) of section 161.10 is redesignated as paragraph (g) and subparagraph (2) of the paragraph is amended to read as follows:

(2) When the orderly administration of the range or other public interest so requires, (i) the range manager may provide initially in his decision that it shall be in full force and effect pending decision on an appeal therefrom; (ii) the examiner may provide in the decision on an appeal before him, that it shall be in full force and effect pending decision on any further appeal; (iii) the Secretary may provide by interim order that any decision from which an appeal is taken shall be in full force and effect pending final decision on the appeal. Any action taken by the range manager pursuant to a decision shall be subject to modification or revocation by the examiner, Director, or the Secretary upon an appeal from the decision. In order to insure the exhaustion of administrative remedies before resort to court action, no decision which at the time of its rendition is subject to appeal to a superior authority in the Department shall be considered final so as to be agency action subject to judicial review under sec. 10(c) of the Administrative Procedure Act of June 11, 1946 (60 Stat. 237), unless

it has been made effective pending a decision on appeal in the manner provided in this paragraph.

11. Paragraphs (j), (k), and (l) of section 161.10 are redesignated as paragraphs (h), (i), and (j), respectively.

12. Paragraph (h) of section 161.12 is amended to read as follows:

(h) *Appeals.* Appeal from the decision of the examiner to the Secretary on any matter under this section shall be made in accordance with the rules of practice (Part 221 of this chapter).

(Sec. 2, 48 Stat. 1270; 43 U.S.C. 315a.)

13. The table of contents for Part 221 is amended to read as follows:

Subpart A—Appeals to the Secretary of the Interior

PLEADINGS

Sec.
221.1 Who may appeal.
221.2 Appeal; how taken, filing fee, mandatory time limit.
221.3 Statement of reasons; written arguments.
221.4 Service of notice of appeal and of other documents.
221.5 Answers.

HEARING ON FACTS

221.6 Hearings on appeals involving questions of fact.
221.7 Deposit
221.8 Prehearing conferences.
221.9 Fixing of place and date for hearing, notice.
221.10 Postponements.
221.11 Authority of the examiner.
221.12 Conduct of hearing.
221.13 Evidence.
221.14 Reporter's fees.
221.15 Copies of transcript.
221.16 Summary of evidence.
221.17 Action by examiner.

ORAL ARGUMENT

221.20 Oral argument.

DECISIONS BY SECRETARY

221.25 Action by Secretary on appeal.
221.26 Effect of failure to appeal.

Subpart B—Contests and Protests

PRIVATE CONTESTS AND PROTESTS

221.51 By whom private contest may be initiated.
221.52 Protests.
221.53 Initiation of contest.
221.54 Contests of complaint.
221.55 Amendment of complaint.
221.56 Corroboration required.
221.57 Filing fee.
221.58 Service
221.59 Summary dismissal; waiver of defect in service.
221.60 When service may be made by publication.
221.61 Contents of published notice.
221.62 Publication, mailing and posting of notice.
221.63 Proof of service.
221.64 Answer to complaint.
221.65 Action by Manager.
221.66 Amendment to answer.

GOVERNMENT CONTESTS

221.67 Government contests.
221.68 Proceedings in Government contests.

PROCEEDINGS BEFORE THE EXAMINER

221.69 Prehearing conferences.
221.70 Notice of hearing.
221.71 Postponements.
221.72 Authority of the Examiner.
221.73 Conduct of hearing.
221.74 Evidence.
221.75 Reporter's fees; transcript.
221.76 Findings and conclusions; decision by examiner; submission to Secretary for decision.
221.77 Appeal to Secretary.

Subpart C—General Provisions

221.91 Definitions.
221.92 Filing of documents; payment of fees.
221.93 Record address.
221.94 Transferees and encumbrancers.
221.95 Service.
221.96 Computation of time for filing and service.
221.97 Extensions of time.

221.98 Summary dismissal.
221.99 Basis of decisions; record.
221.100 Official notice.
221.101 Effect of decision pending appeal.
221.102 Regulations governing practice before the Department.
221.103 Inquiries.
221.104 Compulsory attendance of witnesses.
221.105 Application for subpoena.
221.106 Fees payable to witness who testifies on request without issuance of subpoena.
221.107 Power of Secretary.

14. Subpart A, Part 221, is amended to read as follows:

Subpart A—Appeals to the Secretary of the Interior [1]

[1] In addition to the material under this heading, the general provisions under Subpart C of this part should be consulted.

PLEADINGS

§ 221.1 *Who may appeal.* Any party to any proceeding who is adversely affected by a decision of an officer of the Bureau of Land Management shall have a right of appeal to the Secretary of the Interior.

§ 221.2 *Appeal; how taken, filing fee, mandatory time limit.* (a) A person who wishes to appeal to the Secretary must file in the office of the officer who made the decision (not the office of the Secretary) a notice that he wishes to appeal. The notice of appeal must give the serial number or other identification of the case and must be transmitted in time to be filed in the office where it is required to be filed within 30 days after the person taking the appeal is served with the decision he is appealing from. The notice of appeal may include a statement of the reasons for the appeal and any arguments the appellant wishes to make. Such statement must clearly and concisely state the reasons why the appellant thinks the decision appealed from is in error. A mere statement to the effect that the decision is contrary to the law or to the facts is not sufficient.

(b) Except where an agency of the Federal Government or of a State or territorial government or political subdivision thereof or a municipal corporation is the appellant, a filing fee of $5 must be paid for each separate application, mining or other claim, entry, permit, lease, protest, or similar filing or interest on which the appellant is seeking favorable action. The consolidation of appeals will not relieve each appellant of paying the same filing fee that he would have to pay if he took his appeal separately. The filing fee should accompany the notice of appeal but in any event must be received in the

office where the notice of appeal is required to be filed within the time allowed for filing the notice of appeal.

(c) No extension of time will be granted for filing the notice of appeal. If a notice of appeal is filed after the grace period provided in § 221.92, the notice of appeal will not be considered and the case will be closed by the officer from whose decision the appeal is taken. If the notice of appeal is filed during the grace period provided in § 221.92 and the delay in filing is not waived, as provided in that section, the notice of appeal will not be considered and the case will be closed by the Secretary.

(d) Failure to pay the full filing fee within the time required will subject the appeal to summary dismissal as provided in section 221.98, unless the delay in paying is waived as provided in section 221.92.

§ 221.3 *Statement of reasons; written arguments.* If the notice of appeal did not include a statement of the reasons for the appeal as provided in section 221.2, such a statement must be filed in the office of the Secretary (address: Secretary of the Interior, Washington 25, D.C.) within 30 days after the notice of appeal was filed. Failure to file the statement of reasons within the time required will subject the appeal to summary dismissal as provided in section 221.98, unless the delay in filing is waived as provided in section 221.92. In any case the appellant will be permitted to file in such office additional statements of reasons and written arguments within the 30-day period after he filed the notice of appeal.

§ 221.4 *Service of notice of appeal and of other documents.* The appellant must serve a copy of the notice of appeal and of any statement of reasons or written arguments on each adverse party named in the decision appealed from, in the manner prescribed in section 221.95, not later than 15 days after filing each document. Failure to serve each document within the time required will subject the appeal to summary dismissal as provided in section 221.98. Proof of such service as required by section 221.95 must be filed in the office of the Secretary (address: Secretary of the Interior, Washington 25, D.C.) within 15 days after service unless filed with the notice of appeal.

§ 221.5 *Answers.* If any party served with a notice of appeal wishes to participate in the proceeding on appeal, he must file an answer within 30 days after service on him of the notice of appeal or statement of reasons where such statement was not included in the notice of appeal. If additional reasons or written arguments are filed by the appellant, the adverse party shall have 30 days after service thereof on him within which to answer them. The answer must state the reasons why the answerer thinks the appeal should not be sustained. Answers must be filed in the office of the Secretary (address: Secretary of the Interior, Washington 25, D.C.) and must be served on the ap-

pellant, in the manner prescribed in section 221.95, not later than 15 days thereafter. Proof of such service, as required by section 221.95, must be filed in the office of the Secretary (see address above) within 15 days after service. Failure to answer will not result in a default. If an answer is not filed and served within the time required, it may be disregarded in deciding the appeal, unless the delay in filing is waived as provided in section 221.92.

Hearing on Facts

§ 221.6 *Hearings on appeals involving questions of fact.* Either an appellant or an adverse party may, if he desires a hearing to present evidence on an issue of fact, request that the case be assigned to an examiner of the Bureau of Land Management for such a hearing. Such a request must be made in writing and filed with the Secretary within 30 days after answer is due and a copy of the request should be served on the opposing party in the case. The allowance of a request for hearing is within the discretion of the Secretary and the Secretary may, on his own motion, refer any case to an examiner for a hearing on an issue of fact. If a hearing is ordered, the Secretary will specify the issues upon which the hearing is to be held.

§ 221.7 *Deposit.* If a request for a hearing is granted, a deposit of $20 toward reporters' fees will be required of the parties who made the request. Other parties who appear at the hearing will be requested to pay their share of the fees at that time.

§ 221.8 *Prehearing conferences.* (a) The examiner may, in his discretion, on his own motion or motion of one of the parties or of the Bureau of Land Management, direct the parties or their representatives to appear at a specified time and place for a prehearing conference to consider: (1) The possibility of obtaining stipulations, admissions of fact and agreements to the introduction of documents, (2) the limitation of the number of expert witnesses, and (3) any other matters which may aid in the disposition of the proceedings before the examiner or before the Secretary.

(b) The examiner shall make an order which recites the action taken at the conference and the agreements made as to any of the matters considered, and which limits the issues for hearing to those not disposed of by admissions or agreements. Such order shall control the subsequent course of the proceeding before the examiner unless modified for good cause, by subsequent order.

§ 221.9 *Fixing of place and date for hearing; notice.* The examiner shall fix a place and date for the hearing and notify all parties as well as the Bureau and the Secretary.

§ 221.10 *Postponements.* (a) Postponements of hearings will not be allowed upon the request of any party or the Bureau except upon a

showing of good cause and proper diligence. A request for a postponement must be served upon all parties to the proceeding and filed in the office of the examiner at least 10 days prior to the date of the hearing. In no case will a request for postponement served or filed less than 10 days in advance of the hearing or made at the hearing be granted unless the party requesting it demonstrates that an extreme emergency occurred which could not have been anticipated and which justifies beyond question the granting of a postponement. In any such emergency, if time does not permit of the filing of such request prior to the hearing, it may be made orally at the hearing.

(b) The request for a postponement must state in detail the reasons why a postponement is necessary. If a request is based upon the absence of witnesses, it must state what the substance of the testimony of the absent witnesses would be. No postponement will be granted if the adverse party or parties file with the examiner within 5 days after the service of the request a statement admitting that the witnesses on account of whose absence the postponement is desired would, if present, testify as stated in the request. If time does not permit the filing of such statement prior to the hearing, it may be made orally at the hearing.

(c) Only one postponement will be allowed to a party on account of the absence of witnesses unless the party requesting a further postponement shall at the time apply for an order to take the testimony of the alleged absent witness by deposition.

§ 221.11 *Authority of the examiner.* The examiner is vested with general authority to conduct the hearing in an orderly and judicial manner, including authority to subpoena witnesses and to take and cause depositions to be taken in accordance with the act of January 31, 1903 (32 Stat. 790; 43 U.S.C. 102-106), to administer oaths, to call and question witnesses, to make proposed findings of fact and to take such other actions in connection with the hearing as may be prescribed by the Secretary in referring the case for hearing. The issuance of subpoenas, the attendance of witnesses, and the taking of depositions shall be governed by the applicable provisions of Subpart C of this part.

§ 221.12. *Conduct of hearing.* So far as not inconsistent with the prehearing order, the examiner may seek to obtain stipulations as to material facts. Unless the examiner directs otherwise, the appellant will present his evidence on the facts at issue following which the other parties and the Bureau of Land Management will present their evidence on such issues.

§ 221.13 *Evidence.* (a) All oral testimony shall be under oath and witnesses shall be subject to cross-examination. The examiner may question any witnesses. Documentary evidence may be received if pertinent to any issue. The examiner will summarily stop examination and exclude testimony which is obviously irrelevant and immaterial.

(b) Objections to evidence will be ruled upon by the examiner. Such rulings will be considered, but need not be separately ruled upon, by the Secretary in connection with his decision. Where a ruling of an examiner sustains an objection to the admission of evidence, the party affected may insert in the record, as a tender of proof, a summary written statement of the substance of the excluded evidence and the objecting party may then make an offer of proof in rebuttal.

§ 221.14 *Reporter's fees.* (a) Where a hearing is requested, each party and the Bureau will be required to pay the reporter's fees covering the party's or the Bureau's direct evidence and cross examination of other witnesses.

(b) Where a hearing is ordered by the Secretary upon his own motion, each party who prevails in the Secretary's decision will be required to pay the reporter's fees covering the party's direct evidence and cross examination of other witnesses. The remainder of the reporter's fees will be paid by the Government.

(c) Reporter's fees will be at rates established for the local courts or, if the reporting is done pursuant to a contract, at rates established by the contract. The examiner may require the parties to make reasonable deposits for reporter's fees from time to time in advance of taking testimony. Any part of a deposit not used will be returned to the depositor except that deposits which are required pursuant to section 221.7 in advance of a hearing will not be returned if the party making the deposit does not appear at the hearing, but will be used to pay the reporter's appearance fee, if any, and the remainder will be forfeited to the United States.

§ 221.15 *Copies of transcript.* Each party must pay for any copies of the transcript obtained by him except where the reporter's fees paid enable the Bureau to furnish him with a copy of the transcript without additional cost. Unless a summary of the evidence is stipulated to, the Government will file the original copy of the transcript with the case record.

§ 221.16 *Summary of evidence.* The parties and the Bureau may, with the consent of the examiner, agree that a summary of the evidence approved by the examiner may be filed in the case in lieu of a transcript. In such case the examiner will prepare the summary or have it prepared and upon agreement of the parties make it a part of the case record.

§ 221.17 *Action by examiner.* Upon completion of the hearing and the incorporation of the summary or transcript in the record, the examiner will send the record and proposed findings of fact on the issues presented at the hearing to the Secretary. The proposed findings of fact will not be served upon the parties; however, the parties and the Bureau may, within 15 days after the completion of the transcript or the summary of the evidence, file with the Secretary such

briefs or statements as they may wish respecting the facts developed at the hearing.

Oral Argument

§ 221.20 *Oral argument.* The Secretary may, in his discretion, grant an opportunity for oral argument before him or a person designated by him.

Decisions by Secretary

§ 221.25 *Action by Secretary on appeal.* The Secretary will render a written decision in each case appealed to him. Such decisions will be served on all parties and shall not be subject to further appeal in the Department.

§ 221.26 *Effect of failure to appeal.* When any party fails to appeal to the Secretary from an adverse decision of an officer of the Bureau of Land Management, that decision shall as to such party be final and will not be disturbed except for fraud or for gross irregularity.

15. Subpart B, Part 221, is repealed.

16. Subpart C, Part 221, is redesignated as Subpart B, and in the footnote to the heading of former Subpart C the designation of Subpart D is changed to Subpart C.

17. Section 221.72 is amended by changing "Subpart D" to "Subpart C."

18. Sections 221.74, 221.76, and 221.77 are amended by changing "Director" to "Secretary,"

19. Subpart D, Part 221, is redesignated as Subpart C.

20. Paragraph (d) of section 221.91 is repealed.

21. Section 221.92 is amended to read as follows:

§ 221.92 *Filing of documents; payment of fees.* (a) A document is filed or a fee is paid in the office where the filing or payment is required only when the document or payment is received in that office during the office hours when filing is permitted and the document or fee is received by a person authorized to receive it.

(b) Whenever a document or fee is required under this part to be filed or paid within a certain time and it is not received in the proper office, as provided in paragraph (a) of this section, during that time, the delay in filing or payment will be waived if the document is filed or fee is paid not later than 10 days after it was required to be filed or paid and it is determined that the document or fee was transmitted or probably transmitted to the office in which the filing or payment is required before the end of the period in which it was required to be filed or paid. Determinations under this paragraph shall be made by the officer before whom is pending the appeal or contest in connection with which the document or fee is required to be filed or paid. This paragraph does not apply to requests for postponement of hear-

ings under sections 221.10 and 221.71 and requests for relief from reporter's fees under section 221.75 or to payments required under sections 221.7, 221.14, 221.57, or 221.75.

2. Paragraphs (a) and (b) of section 221.95 are amended to read as follows:

(a) Wherever the regulations in this part require that a copy of a document be served upon a person, service must be made by delivering the copy personally to him or by sending the document by registered or certified mail, return receipt requested, to his address of record in the Bureau.

(b) In any case service may be proved by an acknowledgment of service signed by the person to be served. Personal service may be proved by a written statement of the person who made such service. Service by registered or certified mail may be proved by a post-office return receipt showing that the document was delivered at the person's record address or showing that the document could not be delivered to such person at his record address because he had moved therefrom without leaving a forwarding address or because delivery was refused at that address or because no such address exists. Proof of service of a copy of a document should be filed in the same office in which the document is filed except that proof of service of a notice of appeal should be filed in the office of the Secretary, if the proof of service is filed later than the notice of appeal.

23. Paragraph (a) of section 221.97 is amended to read as follows:

(a) With the exception of the time fixed for filing a notice of appeal, the time for filing or serving any document in connection with an appeal may be extended by the Secretary.

24. Section 221.98 is amended to read as follows:

§ 221.98 *Summary dismissal.* An appeal to the Secretary will be subject to summary dismissal by the Secretary for any of the following causes:

(a) If the full filing fee is not paid within the time required;

(b) If a statement of the reasons for the appeal is not included in the notice of appeal and is not filed within the time required;

(c) If the notice of appeal is not served upon adverse parties within the time required; and

(d) If the statement of reasons, if not contained in the notice of appeal, is not served upon adverse parties within the time required.

25. Paragraph (b) of Section 221.99 is amended by changing "Director" to "Secretary."

26. Section 221.101 is amended to read as follows:

§ 221.101 *Effect of decision pending appeal.* Normally a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending

the decision on appeal. However, when the public interest requires, the Secretary may provide that a decision or any part of it shall be in full force and effect immediately.

27. Section 221.104 is amended to read as follows:

§ 221.104 *Compulsory attendance of witnesses.* The examiner is authorized to issue subpoenas directing the attendance of witnesses at hearings to be held before him or at the taking of depositions to be held before himself or other officers. The issuance of subpoenas, service, attendance fees, and similar matters shall be governed by the act of January 31, 1903 (43 U.S.C. 102-106), and 28 U.S.C. 1821. Subpoenas will be issued on Form No. 4-622.

28. Section 221.105 is amended to read as follows:

§ 221.105 *Application for subpoena.* An application for a subpoena may be filed in the office of the examiner before whom the hearing is to be held, in the office of the officer who made the decision appealed from, or in the office of the manager in which a complaint was filed, in which case the officer or manager will forward the application to the examiner.

(R.S. 2478; 43 U.S.C. 1201.)

SECRETARY OF THE INTERIOR

APPENDIX E

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON 25, D.C.
Feb. 1, 1961

Dear Mr. McCarty:

It was a pleasure to meet with you last Wednesday. I have no objection to publication in the Administrative Law Review of the American Bar Association the January 6, 1961, letter to you from former Assistant Secretary, George W. Abbott.

My decision in this respect is not to be construed in any way either as approval or disapproval of Mr. Abbott's proposals. I have found that I have been unable to give this matter sufficient time and attention to make a decision. In view of this, of course, the proposed rulemaking will not be forewarded to the Federal Register for publication at this time. I feel, however, that the views of your Committee, as well as those of other interested members of the Bar, will be invaluable in reaching any decision. Accordingly, we will welcome any comments, criticisms or suggestions which you, your Committee or the membership of the ABA may have to aid us in formulating the best possible plan, for fairly resolving all the issues and problems implicit in this important matter.

I shall look forward to working with you and your Committee on the natural resource matters in which we will be mutually interested during the ensuing years.

Let me take this opportunity to thank you for your courtesy and cooperation.

Cordially,
FRANK J. BARRY
Solicitor

APPENDIX F

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON 25, D.C.
Feb. 7, 1961

Robert L. McCarty, Esq.
Chairman
Committee on Natural Resources
Administrative Law Section
American Bar Association
1203 Walker Building
Washington 5, D.C.

Dear Mr. McCarty:

We believe it would be helpful to have your Committee's views on two other proposals relating to the decision-making processes of this Department which have been studied in this office in the past.

Briefly, the first involves the elimination of appeals to the Secretary, except as a matter of discretion. Under this proposal decisions of the Director, Bureau of Land Management, would be final, subject to a petition to the Secretary for the allowance of an appeal, like a petition for a writ of certiorari. Appeals to the Secretary would only be allowed where there is egregious error, an important question of law or policy, or a conflict in the decisions below. Additionally, certain types of appeals would be abolished altogether. Thus, for example, denial of an application for lands which are unavailable for disposition because already patented or withdrawn from the type of disposal applied for would not be appealable, unless an interpretation of the withdrawal order was involved. Similarly, appeals would not be allowed in mineral leasing cases from denials of applications where the lands involved are under the jurisdiction of another agency which had refused to consent to the lease or permit.

The second proposal combines elements from both Mr. Abbott's plan and the one outlined above. Under it, the Division of Appeals would be established in the Office of the Solicitor. However, one

additional branch would be added. This branch exclusively would handle the appeals in cases required to be heard and decided in accordance with sections 5, 7, and 8 of the Administrative Procedure Act. The head of that branch would have specially delegated authority to decide those appeals. Appeals in these cases would be direct to the Secretary from hearing examiners' decisions. All other cases would be handled in the manner prescribed in the second paragraph, above, except that there would be no elimination of any appeals to the Director.

The basic goals in any plan are to afford final administrative determination in the fairest, quickest, most efficient and economical manner possible. It may well be that another recommendation, not yet considered, may ultimately be the one, if any, selected. We are not, at this time, committed to any course but interested in evaluating all possible solutions.

Cordially,
FRANK J. BARRY
Solicitor

OBSERVATIONS ON THE ORGANIZATION AND PROCEDURES SURVEYS OF THE ICC: A SUBCOMMITTEE REPORT *

This sub-committee was established by Chairman Harry Breithaupt of the Interstate Commerce Committee for the purpose of considering the report on "Organization and Procedures Survey of the Interstate Commerce Commission" prepared at the instance of the Bureau of the Budget by Booz, Allen & Hamilton, dated November 1960, and "First Report on Commission's Organization and Internal Procedure to the Interstate Commerce Commission by the Special Advisory Committee on Interstate Commerce Commission Practices and Procedures," dated October 1, 1960.

Subsequent to the appointment of your Subcommittee, a number of other reporting and investigatory activities have been released pertaining to recommendations as to the organization and procedures of the Interstate Commerce Commission.

The Doyle Group Report to the Senate Interstate and Foreign Commerce Committee has recently been issued in the form of a "Draft Report" calling for legislation to transfer the major economic and related functions of the Interstate Commerce Commission, the Civil Aeronautics Board and the Federal Maritime Board into an independent Federal Transportation Commission responsible to Congress, and calling for establishment, in the executive branch, of a Department of Transportation. Our Subcommittee has not undertaken to review this voluminous study since we deem it beyond the scope of the assignment to this Subcommittee. Such Draft Report pertains to reorganization of transportation functions generally by legislation rather than the reorganization and procedures of the Interstate Commerce Commission and, accordingly, beyond the authority of this Subcommittee.

Subsequent to the release of these documents, and on November 10, 1960, President-elect John F. Kennedy announced the

* It should be noted that this report, in its present posture, represents only the conclusions and recommendations of a subcommittee of the Committee on Interstate Commerce. The full committee is now being asked to consider the subcommittee's report with a view toward its endorsement for submission to the Council of the Section of Administrative Law.

Harry J. Breithaupt, Jr.
Chairman, Committee on
Interstate Commerce

appointment of Dean James M. Landis to examine and to report back to him problems in the improvement of organizations and procedures of the regulatory commissions and other administrative agencies. Such report was released December 27, 1960. Such Landis Report, of necessity, must influence the report of this sub-committee.

Scope of This Report

The scope of the inquiry of your sub-committee as related primarily to the consideration of:

(1) The legalistic approach to and resulting achievement of the problem involved.

(2) The legal aspects of the legislative, administrative and judicial processes involved.

Your sub-committee has not undertaken to delve into the details of administrative housekeeping so long as such problems do not relate to the accomplishment of the statutory duties and obligations of the Interstate Commerce Commission, but if such administrative housekeeping does relate to the performance of the statutory duties and obligations it has considered such problem. Your sub-committee has not considered the reassignment of present statutory duties of the Interstate Commerce Commission to other agencies or the elimination of such duties, but only the proper functioning of the Interstate Commerce Commission within the framework of its present statutory powers and duties.

While each of the members of this sub-committee presently engages in practice before the Interstate Commerce Commission, the members of your sub-committee have undertaken to operate upon the cardinal premise that in order to properly function as a committee in serving a duty to the American Bar Association, it is imperative that the membership operate only as members of the Bar, and not as spokesmen for our respective clients.

Background of Studies

The "Organization and Procedures Survey of the Interstate Commerce Commission" was prepared by Booz, Allen & Hamilton, Management Consultants, as authorized by the Bureau of the Budget, Executive Offices of the President. An extensive survey was made by Booz, Allen & Hamilton over a period of six months relative to the organization and operations of the Interstate Com-

merce Commission for the purpose of determining whether there exists any opportunities for improvement in speed and effectiveness with which the Commission performs its functions and in the costs thereof. It concluded that six inter-related problems face the Commission:

> (1) The Commission members are over-burdened with decisional and management issues.
>
> (2) There is no effective Commission or agency level focus of management responsibility.
>
> (3) The decisional processes are overly judicialized and permit far too many reconsiderations of the same case and far too much of the case load to rise to the Commission level.
>
> (4) The organization and activities of the ten semi-autonomous bureaus suffer from a multiplicity of conflicting rationales.
>
> (5) There is no coordination of field activities at either the field or headquarters level below the Commission itself.
>
> (6) While the handling of large quantities of data is vital to activities in all areas, (a) relatively little advantage presently is taken of modern equipment and techniques for massive processing of data, and (b) there is inadequate analysis of available data for, and use of it in, policy formulation and the relating of individual cases over all situations.

The Special Advisory Committee on Interstate Commerce Commission Practices and Procedures was created by the Commission in November, 1959 by the appointment by the Chairman of the Commission of seventeen lawyers and one non-lawyer, all of whom are members of the Commission's Bar,[1] with a directive to inquire broadly into the organization and functioning of the Commission, to identify inadequacies and inefficiencies, and to make recommendations to the Commission for improvement in its organization and work, and in practice and procedure before it. It made 20 specific recommendations:

> (1) In the proposed reorganization of the Commission, the principle be recognized and followed as far as practicable that all *administrative* responsibilities and duties, including both *managerial* and *regulatory,* at the Commission level, should be centralized into an Executive Department headed by the Execu-

[1] Pursuant to 49 U.S.C.A. 17(12), the Commission has prescribed rules of practice and admissions to practice before it, having classified practitioners as Classes A (lawyers) and B (non-lawyers), requiring examination for admission of non-lawyers. Classes A and B practitioners may each engage in general practice before the Commission.

tive Commissioner, thereby relieving the other Commissioners of all other functions and permitting them to devote their activities to *policymaking* and *ad hoc adjudication* which pertain to legislative or judicial functions.

(2) The Executive Commissioner should be a Commissioner of several year's experience as such, to be selected by the Commission, with a term of office at the longest period deemed feasible, preferably for so long as he shall remain a Commissioner, subject, however, to the pleasure of the Commission. He should be the chief executive of the Commission except in respect to *adjudicatory functions.* At his option, he should be relieved of adjudicatory duties except in *policymaking* proceedings of general transportation importance and as tie breaker in decisions of the Commission *en banc.* From time to time he should advise the Commission of the discharge of his duties.

(3) The Administrator, who should be a man experientially qualified to administer a large, highly intelligent technical organization and reasonably well-versed in the Interstate Commerce Act and decisions thereunder, should be appointed by the Executive Commissioner, subject to the approval of the Commission and hold office subject to the pleasure of the Executive Commissioner. Subject to the general direction and supervision of the Executive Commissioner, he should have plenary authority over all *"administrative"* activities of the Commission (except discipline of Hearing Officers) and, subject to the approval of the Executive Commissioner, he should appoint three *administrative* officers who should report to him, viz., a General Manager, a Director of Regulations, who should report to him in all matters, and a Director of Proceedings who should report to him only in *administrative* matters.

(4) The General Counsel should be charged with the additional duties (a) to head a Rules Committee of staff officers and practitioners to recommend with respect to changes in the Rules of Practice; (b) to make recommendations with respect to and draft proposed changes in legislation—and to that end the present legislative staff should be transferred to his office; and (c) to head, a chairman, a grievance committee, composed of members of the Commission's *adjudicatory* staff (hearing officers and attorneys), with respect to their Code of Ethics, and similarly to head as chairman of a grievance committee of practitioners engaged in active practice before the Commission, including representatives of each of the practitioner associations.[2] These grievance

[2] Motor Carrier Lawyers' Association, composed solely of Class A practitioners, and Association of Interstate Commerce Commission Practitioners, composed of Classes A and B Practitioners.

committees shall have the responsibility of enforcing observance of the respective Codes of Ethics.

(5) The Secretary shall be charged with the additional duties of the executive responsibility for the analysis and evaluation of economic research, conducted by the Office of Regulations, and with an affirmative and continuing duty to make recommendation to the Commission respecting particular areas in which *policymaking* is indicated.

(6) Subject solely to the direction and supervision of the Administrator, all *managerial* functions should be delegated to the Office of Management, headed by a General Manager, except discipline of Hearing Officers and employment, supervision and discipline of such of the personal staffs of the Members of the Commission and of the Executive Officers as the Commission from time to time shall prescribe.

(7) There should be created the Office of Regulations, charged with the duty to direct and coordinate all *regulatory* functions. The *regulatory* work of the present ten bureaus should be reassigned to a limited number of functional bureaus, their adjudicatory functions and Hearing Officers should be reassigned to the Office of Proceedings, and attorneys-advisors engaged in review and report writing should be assigned to the offices of the several Commissions. Functions of the employee boards now in the bureaus should be assigned to the direction of the Office of Proceedings.

(8) Each Field or Regional Office should be integrated under a single Regional Manager, reporting as to the *managerial* duties to the General Manager and as to *regulatory* activities, to the Director of Regulations.

(9) The Commission should endeavor fully to exercise its powers under Section 17 of the Act by making further delegation to Employee Boards. In addition to the present Board, the Commission should create a sufficient number of new Employee Boards and enlarge the jurisdiction of present Boards to (a) finally decide all nonadversary license proceedings, subject only to review by a petition for reconsideration; (b) determine appeals from interpretative orders of the several *regulatory* bureaus, subject to the recommended report and order procedure. The members of such Board should be qualified adjudicators of hearing officer status, appointed upon the joint recommendation of the Directors of Regulation and Proceedings and subject to the approval of the Chairman (any differences being resolved by the Chairman), to serve under the direction and supervision and discipline of the Director of Proceedings subject to the approval of the Chairman.

(10) The functions of the Secretary and of the several *regula-*

tory bureaus, insofar as they relate to any decisional process, should be consolidated into a new office, to be called the Office of Proceedings, headed by a Director of Proceedings appointed by the Chairman, subject to the approval and confirmation of the Commission *en banc*. The Director, under the supervision of the Chairman, should direct, supervise and coordinate all proceedings (including these before Hearing Officers, Employee Boards and Joint Boards) up to the time the proceeding is submitted to the Chairman for assignment to a Commissioner or a Division. Subject to the approval of the General Manager, he should employ; supervise and discipline all of his subordinate staff and employees, except that discipline of Hearing Officers should be made subject to the approval of the Chairman. He should have had at least five years' experience with the Commission as a Bureau Director or Assistant Director, a member of the General Counsel's staff or Employees Board or Hearing Officer staffs. He should serve subject to the pleasure of the Chairman.

(11) All prehearing activities should be centered in a single section in the Office of Proceedings, whose principal functions, in addition to those now performed by the Secretary and the several proceedings bureaus, should be (a) to eliminate from the hearing process, by assignment to Employee Boards or through summary disposition, all nonadversary proceedings and all proceedings where no substantial issue of fact or law is presented, and (b) to develop and implement adequate pretrial procedures designed to simplify and expedite hearing proceedings and to insure that a complete record, free of all extraneous and immaterial matter, will be made.

(12) Hearing officers should be subjected to a period of intense training in the performance of the duties of their office, frequently supplemented throughout their tenure. They should be given hearing and prehearing power similar to those of a trial judge. They should be afforded competent secretarial service and facilities. They should be subject to disciplinary action by the Director of Proceedings, subject to the approval of the Chairman. The form and arrangement and general requisites of initial reports should be formally prescribed by the Commission Order.

(13) To assure informed responsible decisions by the participating Commissioners, in all proceedings the preparation of the draft of the final report should be assigned to individual Commissioners, and after the same has been drafted, it should be signed by such Commissioner as a certification that he has read the appeal papers and has personally directed or participated in the preparation of the final report, based upon an informed knowl-

edge of the facts in the case, the contentions of the parties and the applicable law or policy to be followed.

(14) Each Commissioner should be provided with a top level aide of outstanding qualifications and of the highest grade available to direct such Commissioner's staff. Qualified hearing officers and attorney-advisors should be encouraged to become members of that staff, members of which should have a status and grade above that of a hearing officer. The qualified attorney-advisors now in the Commissioners' offices and in the three proceeding bureaus who are engaged in the preparation or review of final reports should be transferred to that staff. Such staff should be adequate to enable the Commissioner's work to be completed expeditiously.

(15) Pursuant to authority contained in Section 17 of the Interstate Commerce Act, the Commission should adopt a procedure implementing the delegation of all proceedings which are not of general transportation importance to individual Commissioners for decision and preparation of the final report and order.

(16) (a) Three standing Divisions of three members each should be created upon a functional basis to (i) decide initially proceedings of general transportation importance, and (ii) finally dispose of petitions for reconsideration of decisions of individual Commissioners and of Employee Boards. (b) All such proceedings should be assigned by the Chairman to individual members of the Division for the preparation and submission to the Division of a final report. (c) All decisions and adoption of such final reports should be pursuant to a conference procedure rather than by notation.

(17) The following duties and functions should be delegated to the Chairman:

> (a) To preside at all *en banc* sessions; (b) to set time and place of all sessions, conferences and agenda of the Commission *en banc* and control its argument calendars; (c) to appoint members to serve on the Appellate Division and fill temporary or permanent vacancies therein; (d) according to such general standards as the Commission *en banc* from time to time shall prescribe, to assign all appeals from initial reports of examiners or boards, to the Commission *en banc,* the Divisions and individual Commissioners; (e) similarly to assign all petitions for reconsiderations; and (f) upon internal review to recommend reconsideration of decisions: (i) of individual Commissioners or Boards to Appellate Divisions or the Commission *en Banc;* or (ii) of Divisions to the Commission *en banc.* At his option he should be relieved of other *adjudicatory* duties to the

extent necessary to permit adequate discharge of these duties. The Chairman should be a Commissioner of at least three years service, selected by the other Commissioners for such term as they shall from time to time fix.

(18) The Commission *en banc* should reserve itself only (a) appointment of the Chairman and Executive Commissioner; (b) confirmation of appointments of Administrator, General Counsel, Secretary and Director of Proceedings; (c) prescription from time to time of general standards to guide the Chairman in assigning cases; (d) all *policymaking;* (e) consideration of proceedings of general transportation importance initially assigned to it by the Chairman; and (f) consideration of all petitions for reconsideration of decisions of Appellate Divisions or where assigned to it by the Chairman of decisions of an Employee Board or individual Commissioner.

(19) Subject only to such further internal review as the Commission on its own motion may undertake, a petition for reconsideration of a final order of: (a) a Board be finally ruled upon by an individual Commissioner, Appellate Division or the Commission *en banc,* as referred by the Chairman; (b) an individual Commissioner, by an Appellate Division or the Commission *en banc,* as referred by the Chairman, and (c) a Division by the Commission *en banc;* provided, however, that any such petition may allege that the issues involved are of general transportation importance and pray reference of the petition to the Commission *en banc,* but the action of the Chairman upon such prayer should be final and non-reviewable.

(20) The Commission should adopt as a basic policy; (a) that major issues of general transportation policy should be settled at the earliest time consistent with thorough consideration and the policy declared therein should govern all of its Divisions, individual Commissioners, officers and employees thereafter, (b) that as far as possible such policies be determined objectively in general *ex parte* rulemaking proceedings in which all interested members of the general public are afforded the opportunity to be heard; and (c) whenever such an issue is found to be present in one or more pending *ad hoc adjudicatory* proceedings, such proceedings should be immediately consolidated with an *ex parte* rulemaking proceeding instituted to declare such policy. *Policymaking* proceedings should be initiated by the Commission *en banc,* either on its own motion, with or without petition, or on the recommendation of the Chairman, the Secretary, Executive Commissioner, or any three Commissioners. The officers of the Commission and the Directors of the Bureau should be directed to submit proposals for the initiation of such proceedings.

On November 10, 1960, President-elect John F. Kennedy announced the appointment of James M. Landis to examine and report back to him on problems in the area of improvement of organization and procedures of the regulatory Commissions and other administrative agencies. Such report was made by Dean Landis and released on December 27, 1960. Dean Landis was formerly dean of the Harvard Law School, and former Chairman of both the Securities and Exchange Commission and the Civil Aeronautics Board.

The principal attack of Dean Landis appears to be upon the Interstate Commerce Commission in his report dealing with all of the Federal Government regulatory agencies. His criticisms include:

(i) The Commission lacks positive direction because of the absence of the position of a chairman who is other than a presiding officer. Such a chairman should be appointed by the President with managerial control over the Commission, be the spokesman for the Commission, and relieve other members of the Commission of administrative responsibilities.

(ii) Too many matters are submitted to the entire Commission en banc of inconsequential nature.

(iii) "Opinions of the Interstate Commerce Commission are presently in the poorest category of all administrative agency opinions. Their source is unknown and the practice has grown up of parsimony in discussing the applicable law in making a determination. Lengthy recitals of the contentions of the various parties are made as a prelude to a succinct conclusion devoid of real rationalization."

(iv) Law clerks should be personally attached to a Commissioner for the purpose of assisting the individual Commissioners in the necessarily assigned responsibility of expressing their conclusions in individual opinions. Temporary assignment attorneys from the staff of a Bureau will not suffice.

(v) A major problem is presented in the delegation of appropriate duties to persons below the Commission level, but greater utilization of delegation powers should be made, with the right of appeal.

(vi) A serious question is presented as to whether a reorganization plan could make final the decisions by single Commissioners, Hearing Examiners, or employee boards in certain groups of cases, but a reorganization plan could make them final subject to review akin to the selective review by certiorari now employed by the Supreme Court of the United States.

(vii) The single Commissioners technique is rarely utilized, and a panel of three should be replaced by a single Commissioner for the conservation of the time of the two Commissioners.

(viii) The problem of Hearing Examiners has been badly handled by the Commission. The classification of some Examiners is below those of Examiners in other major agencies. They are regularly assigned to particular Bureaus and thus confined both in interest and outlook. They have been subjected to the indignity of time clock control. They have neither secretaries nor other assistants to aid them and frequently are ill-housed. Their reports are too frequently rewritten for no discernible purpose.

(ix) Other reorganizations of the functions of the Commission as well as the tightening and refining of its procedural rules can be effected without the need of a reorganization plan, all of which could be effected by an energetic and competent chairman.

The recommendations of Dean Landis go far beyond the reorganization of procedures and practices within the Commission internally. Among other things he would create within the Executive Office of the President an office for the Coordination and Development of Transportation Policy, transferring to this Office all of the responsibilities now vested in the Under Secretary of Commerce for Transportation, and vest broad powers therein. However, those matters involve, in the main, legislative sanction, beyond the scope of the report of our Subcommittee relating to internal organization and procedure of the Interstate Commerce Commission without regard to legislation.

On January 3, 1961, the Legislative Oversight Sub-committee of the House Interstate and Foreign Commerce Committee issued a report making the following recommendations with respect to the Interstate Commerce Commission:

(1) In view of the disclaimer by the Commission of the duty to inquire into any question concerning fitness of applicants, apart from their performance of motor transportation, it recommended that the Interstate Commerce Act be clarified so as to require that the character of applicants be considered in connection with fitness.

(2) Every applicant should be required to submit statements from all of its owners and officers, similar to that required from applicants for Federal employment, giving information bearing on the issue of fitness, especially information concerning arrests or convictions for fines.

(3) The Commission should establish administrative policies and procedures to insure that all evidence in the possession of any

member or employee of the Commission bearing on the fitness of an applicant will be incorporated in the record of any proceeding where such fitness is relevant.

(4) The Commission should establish administrative policies and procedures to insure that any evidence of violation of law brought out in any of its proceedings will be reported to the Commission and to the Bureau of Inquiry and Compliance to enable the Commission to determine what if any further investigation should be made, what administrative sanction should be imposed and whether the matter should be referred to the Department of Justice for prosecution.

(5) The Commission should be authorized to revoke or suspend licenses and certificates of carriers upon conviction in Federal courts of willful violations of the Act and regulations thereunder without further formal proceedings.

(6) The Commission should reorganize its procedures for handling applications for operating rights to eliminate the time and expense wasted in formal hearings in uncontested cases.

(7) To accomplish the purpose of the preceding recommendation, the Commission should amend its rules to provide for inclusion in the application itself of sufficient information, including evidence concerning fitness, to enable the Commission to dispose of the matter on the basis of the application itself if no notice of protest is filed and the Commission has no evidence that needs to be developed on the issue of fitness.

(8) The Commission should amend its rules and establish criteria for extending the use of non-hearing procedures in cases where no seriously contended issue of fact is likely to develop, even if the applicant does not request such procedure.

(9) The institutional processing of decision should be eliminated and there should be assigned personal responsibility to individual commissioners for the preparation of opinions. Unless and until that procedure is followed, a copy of the final draft prepared by the reviewing staff should be placed in the public docket so that interested persons could ascertain whether the requirement has been complied with to identify differences between the Examiner's report and the draft of the final report.

Commission Action on Proposals and Recommendations

The Thursday, January 12, 1961 issue of *Federal Register* at pages 223 and 224 contains proposed amendments to the Com-

mission's Rules of Practice which would have the general effect of limiting reconsiderations of reports and orders to matters of general transportation importance and to matters where a reversal of the prior decision has been made.

On January 9, 1961, the Commission created 3 finance boards of staff employees to dispose of all non-adversary or uncontested proceedings processed by its Bureau of Finance. On January 23, 1961, the Commission created, effective February 1, 1961 two boards of employees, designated as Safety and Service Boards, to consider certain actions related to railroad safety and service and transportation of explosives and other dangerous articles, expecting thereby to eliminate some 300 matters annually from consideration by the Commission's Division 3, which proceedings are of the non-adversary or unopposed type and do not involve the taking of testimony at a public hearing. Division 3 will act as the Appellate Division for reconsideration or review of the Safety and Service Boards' actions, and the decisions of Division 4 will be administratively final and not subject to review by the Commission.

On January 23, 1961 the Interstate Commerce Commission delegated authority to the Director of the Bureau of Inquiry and Compliance to institute civil injunction proceedings involving motor carriers, and to recommend to the Department of Justice or to the U.S. Attorney institution of various criminal prosecutions for civil forfeiture proceedings without formal Commission action in each instance.

On February 13, 1961, the Commission, announced a reorganization to strengthen the office of the Chairman and the creation of the office of Vice-Chairman. Effective March 1, 1961 the "Reporting Commissioner" concept has been abolished, thus relieving the Commissioners, other than the Chairman and Vice-Chairman of executive and administrative duties. Simultaneously there has been a realignment and consolidation of decisional functions into three instead of four divisions of three Commissioners each. Simultaneously opinion-writing responsibility is given to individual Commissioners, so as to enable the Commissioners to exercise more individual responsibility in the preparation of the final reports on those cases generally which have been the subject of an oral hearing and which require a division or Commission report. This latter plan will apply only to cases submitted to a division or the entire Commission for initial decision or reconsideration on and after March 1, 1961.

On February 13, 1961 the Commission established three more boards of employees, designated Motor Carrier Boards, to handle insurance, safety and leasing matters which do not involve testimony at public hearings or submission by affidavit of evidence in opposition. This modification and delegation will relieve Commissioners from acting on an estimated 100 cases annually, thus permitting more time for consideration of major transportation issues.

These changes are demonstrative that the Commission is undertaking affirmative action to implement the recommendations made in the various reports, particularly the report of its own Committee. This action is commendable as an effort to eliminate delays. It is further highly indicative that the Commission is undertaking reorganization on its own motion to effect expedition, while at the same time affording due process.

Recommendations of Subcommittee

It is obvious to your Subcommittee that the American Bar Association should do no more with respect to the matter assigned to your Subcommittee relating to organization and procedures within the framework of the Interstate Commerce Commission and the Interstate Commerce Act than to recommend to the Interstate Commerce Commission the adoption of certain internal reorganization and modification of procedure. To this end, your Subcommittee recommends:

(1) The Chairman of the Commission should be more than a presiding officer. By internal organization, the Commission should vest in the Chairman full power with respect to executive leadership of the Commission by its Chairman, and he should be continued in office at the pleasure of the Commission without the Commission pursuing a policy of rotation. He should serve as spokesman for the Commission in all matters of policy and be its truly executive head rather than a nominal presiding officer.

(2) The Subcommittee makes no recommendation as to whether there should be both a Chairman of the Commission and an Executive Commissioner, but believes that to be a matter for internal determination by the Interstate Commerce Commission.

(3) The Commission should fully exercise its powers under Section 17 of the Act by making further delegation to employee Boards and to individual Commissioners.

(4) Hearing Examiners should be accorded full status as authorized by the Civil Service Commission at all times, so as to attract to the Commission the highest type personnel for Hearing Examiners. The present grade 15 could well be increased in accordance with the recommendations and action of the House of Delegates of the Association.

(5) The institutional decision should be abolished and, in lieu thereof, responsibility should be imposed on individual Commissioners and Hearing Officers for the decisions. The anonymous decision is to be condemned; any decision worthy of release is worthy of signature.

(6) A reorganization should be made as to the intermediate review by non-hearing officers with anonymous recommendations made by such non-hearing officers to the Commission. In lieu thereof, individual Commissioners should have responsibility for and sign their own decisions, assisted by lawyers permanently assigned to their staffs. At no time should reports and recommendations of Hearing Examiners be reviewed by employees of lower status and less experience.

(7) The present format and style of the Commission's reports are of little value as precedents. Too much space and time are taken up in recitation of the facts and contentions of the parties. Too little attention is given to the basic and underlying rationalization in reaching a statutory criteria.

(8) The procedure of making determinations by notation voting, or constructive sessions, as distinguished from dispositions of proceedings in conference, should be dispensed with, whether the determination be by the entire Commission, a division of the Commission, or an employee Board. The responsibility for handling every such proceeding before a conference of Commissioners should be assigned to an individual Commissioner, and the responsibility for handling before an employee Board should be on an individual member of the Board.

(9) The major issues of general transportation policy should be determined through ex parte proceedings or other rule making proceedings rather than in ad hoc adjudicatory proceedings. At present, many policy determinations affecting carriers and the public generally are made in what otherwise appear as relatively unimportant adjudicatory proceedings without prior notice given of the fact that policy issues are involved.

(10) The report of the Legislative Oversight Sub-Committee

of the House Interstate and Foreign Commerce Committee concerning the revocation and suspension of motor carrier licenses and certificates upon conviction of willful violations of the Interstate Commerce Act is too harsh. In the experience of members of this Committee, willfulness has often been inferred from a number of acts which in and of themselves were completely harmless and in certain cases were inadvertent, and consequently, revocation of certificates in the fashion recommended would seem to be extremely harsh. It would appear to suffice that the Interstate Commerce Commission carefully police violations. The Commission's policy of instituting complaint proceedings on its own motion as to alleged violations and intervening in certain application proceedings alleging unfitness of an applicant because of past violations would appear to present adequate evidence of an alertness by the Commission to the problem involved. It appears that the Commission is sufficiently alert to the problem presented without the harsh remedy suggested by the Legislative Oversight Sub-Committee of the House Interstate and Foreign Commerce Committee.

(11) Recent modifications in internal rules of the Interstate Commerce Commission have indicated the intention of the Interstate Commerce Commission to further delegate powers to employee boards within the framework of the present Interstate Commerce Act without amendment, and as authorized by Sec. 17 of the Act. The Booz, Allen & Hamilton Report for the Bureau of the Budget would require substantially greater delegation to employee boards, and to provide for the finality of their action, all to be accomplished as a result of legislative action. While the legislative proposals are deemed beyond the purview of the study of this Sub-Committee, nevertheless we deem it pertinent to comment that the action of the Commission to provide for further delegation within the framework of the present Act is commendable, and serious doubts are expressed by your Sub-Committee as to the wisdom of legislation calling for further delegation and finality in the action of such employee boards. In any event, it would appear advisable to permit of an adequate trial of the plan of delegation to employee boards within the framework of the present Interstate Commerce Act without further legislation at this time to permit of further delegation and finality in connection therewith.

(12) The Commission is to be commended for its recent modification in limiting the right of appeal. The limitation should not

affect the substantial rights of the parties nor matters of general transportation importance.

We particularly commend the recommendations contained in "First Report on Commission's Organization and Internal Procedure to the Interstate Commerce Commission by the Special Advisory Committee on Interstate Commerce Commission Practices and Procedures," dated October 1, 1960, as being an effort by the Interstate Commerce Commission to modify and improve its own procedure. We feel that if the practices and procedures so recommended, in substance and in the main, in such report are put into effect by the Interstate Commerce Commission that it will have cured the major criticisms which have been leveled against it. We commend the Commission for the affirmative action in cleaning its own house.

This Sub-committee further recommends the appointment of a separate Sub-committee to consider pending legislation pertaining to the reorganization of the Interstate Commerce Commission, which subject has been beyond the considerations of this Sub-committee.

Respectfully submitted,
REAGAN SAYERS, *Chairman*
FRANK B. HAND, JR.
* WM. R. MCDOWELL
* PERRY R. MOORE
DONALD L. STERN

* Messrs. McDowell and Moore accepted Sub-committee appointment but have expressed no views on this report.

SUMMARY OF THE THIRD ANNUAL REPORT OF THE OFFICE OF ADMINISTRATIVE PROCEDURE, UNITED STATES DEPARTMENT OF JUSTICE

By Webster P. Maxson, *Acting Director*

The Office's third annual report covers the calendar year 1959. With a staff of two attorneys and the assistance of liaison officers in 50 departments and agencies the Office completed during the year 131 projects of all kinds directed toward improvements in the procedures by which Federal executive departments and administrative agencies determine rights, privileges, and obligations of private interests through agency rulemaking and adjudication.

Because the extent to which an agency can revise its procedures depends in large measure upon limitations imposed by procedural provisions of the statutes administered by the agency, proposed legislation involving such procedural provisions is of primary importance to the functions of the Office. Fifty-two undertakings of the Office during the year concerned bills before the 86th Congress. The Office prepared analyses and comments, conferred with representatives of the agencies involved and Congressional committee staffs, drafted proposed language, and submitted recommendations as to the features of such legislation, all with a view toward assurance that provisions enacted would accord with accepted concepts of fairness and efficiency in administrative proceedings and would provide appropriate opportunity for and standards for judicial review of administrative action.

Nineteen projects of the Office involved cooperation with several agencies in developing or revising rules of practice governing agency rulemaking and adjudication. Seventeen projects consisted of research and recommendations to agencies concerning particular problems in administrative procedures. Two projects involved conferences with the Attorney General, the Solicitor General, and the agencies involved and the preparation of analyses and advice relating to litigation of possible widespread consequence to the administrative process. The remaining forty-one projects covered a wide range of special assignments including cooperation with various groups working toward improvements in administrative procedures and assistance in the preparation of a number of papers dealing with governmental processes.

In addition, the Office served as a central source of information and advice on procedural problems. Informal requests for assistance in the interpretation and application of procedural statutes and rules and requests for help in particular problems in agency procedures were received by the Office with increasing frequency, to the point where work in connection therewith during 1959 was perhaps the major activity of the Office. Responses to such requests were handled on a day-to-day basis, generally through direct and informal communications.

A total of 142 pages of the Office's third annual report is devoted to statistics on the 87,457 formal hearing cases under the Administrative Procedure Act pending during the fiscal years 1958 and 1959 before the 21 Federal departments and agencies which regularly conduct such proceedings.

Volume and backlog data in this compilation show that 63,249 proceedings were concluded by the agencies during the two-year period. The Civil Aeronautics Board, Social Security Administration, and Office of Alien Property substantially reduced their backlog of cases in 1959. The figures show sizable increases in the number of proceedings pending before the Federal Power Commission, the Interstate Commerce Commission, the National Labor Relations Board, and the Securities and Exchange Commission. In this regard, the most critical situation reflected in the compilation is that of the Federal Power Commission. It had 426 cases pending on July 1, 1957. This figure increased to 1,663 on July 1, 1959. Of the total 1,867 proceedings pending before the FPC during fiscal years 1958 and 1959, the Commission rendered final decisions on the merits in contested proceedings in only 64 cases. Examiners disposed of an additional 25 without agency review, 25 were terminated by agreements, 1 was recessed indefinitely, and 89 were withdrawn, leaving a balance of 1,663.

Age data contained in the compilation show that less than 5% of all cases pending before all agencies on June 30, 1959 were more than 3 years old. Most cases were less than six months old. Table 4 of the report demonstrates the over-all time involved in handling each of the cases which, in 1958 and 1959, was disposed of after having travelled the full route through hearing, examiner decision, and agency final decision (less than 9% of all cases concluded during the two-year period). Table 5 reports as to each such case the time from commencement of the proceeding to completion of hearing, Table 6 shows the interval between examiner

initial or recommended decision and agency final decision, and Table 7 indicates time under advisement by the agency.

Part D of the five-part compilation demonstrates time intervals involved in examiner's handling of cases, and the final part, Part E, reports the number of examiners employed in each agency, the average number of days they spent in hearings, the average number of decisions per examiner man-year for each agency, and the number of proceedings assigned to examiners for conduct of hearings only, without decisional responsibility.

According to the report, it was evident as the Office of Administrative Procedure concluded its third year of operation that its activities were not settling into any fixed pattern, but rather were becoming more various as public interest in and agency efforts toward improvements in administrative procedures increased and multiplied.